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NOTES TO LEADING CASES.

Albert E. Daniels *v.* Alfred Pond.

(Reported 21 Pick. 367 : 1838.)

Respective Rights of Landlord and Tenant to Manure made on the demised premises.

Trespass. The first count was for breaking a close and carrying away a quantity of manure. The second was *de bonis asportatis* merely, for the same property.

By an agreed statement of facts, it appeared, that the farm from which the manure was taken by the defendant, was formerly owned by Ira Blake, and was conveyed by him to the plaintiff in December, 1836; that at the time of this conveyance, one Nason was tenant of the farm, under a parol lease from Blake, by the terms of which he was to hold from the 1st of April, 1836, to the 1st of April, 1837; that a part of the manure in question had accumulated at one end of the barn, having been thrown from the stable where Nason's cattle had been fed; that the other part had accumulated in the barn-yard, being composed of hay, &c., that grew on the farm, and of loam or other earth therefrom carried by Nason into the barn-yard; that Nason had removed this part of the manure from the barn-yard to the side of a contiguous highway in the autumn or winter of 1836; and that this highway was over land of which the fee originally belonged to Blake, and was conveyed by him to the plaintiff, as before mentioned.

It further appeared, that in March, 1837, Nason sold the

manure in question, by auction, and that the purchaser was to take it away before the 1st of April; that before the sale, notice was publicly given, at the request of Blake and also of the plaintiff, that they considered the manure to belong to the plaintiff, and that it would be claimed by him of any one who should undertake to buy it; and that the defendant, with such notice, bid off the manure at the auction, and before the 1st of April, 1837, entered upon the enclosed grounds, and carried away that which was at the barn windows, and also carried away that which was by the side of the highway.

If upon these facts the plaintiff was entitled to recover, judgment was to be rendered in his favor, for a certain sum; otherwise he was to become nonsuit.

The case was argued in writing.

Metcalf, for the plaintiff. Trespass lies against a tenant at will for *waste;* and the act complained of in this case, may be considered waste. It seems to follow, that trespass will, *a fortiori*, lie against a third person acting under such tenant in the commission of waste. Savile, 84, *pl.* 164; Co. Litt. 57 *a; Walgrave* v. *Somerset*, (Gouldsb. 72); *Phillips* v. *Covert*, (7 Johns. R. 1); *Treat* v. *Peck*, (5 Connect. R. 280.)

Nason was tenant at will when he sold the manure, and when the alleged trespass was committed; Revised Stat. c. 59, § 29; and the plaintiff may therefore maintain trespass *quare clausum*, although Nason was in possession. *Starr* v. *Jackson*, (11 Mass. R. 519); *Lienow* v. *Ritchie*, (8 Pick. 235.) The authorities to be cited will show, that the injury set forth in the writ, was to the inheritance, and so within the case of *Starr* v. *Jackson*. This point, however, is not very important, as it touches the first count only.

The manure which was on the premises conveyed to the plaintiff at the date of the deed, became his, as between him and the grantor, by virtue of the conveyance. *Stone* v. *Proctor*, (2 Chipman's R. 108); *Kittredge* v. *Woods*, (3 N. Hamp. R. 503.) As between Nason and his landlord, whether Blake or the plaintiff, Nason was not entitled to the manure, though it were made by his own cattle, and from his own fodder. *Lassell* v. *Reed*, (6 Greenl. 222); *Middlebrook* v. *Corwin*, (15 Wendell, 169.)

The present case is stronger as to the manure taken from the highway; for that was composed of the soil of the

farm, which no tenant has a right to carry away. The matter mixed with that soil by Nason could not be separated from it; and the whole, even if there were no other ground for the plaintiff's claim, belonged to the owner of the land. *Anon.* Popham, 38; *Warde* v. *Aeyre*, (2 Bulstr. 323); *Brackenbridge* v. *Holland*, (2 Blackford's Indiana R. 377.)

But it is not necessary to insist, that all the manure passed to the plaintiff by the conveyance of the land, in order to maintain this action. It will be noticed, that nearly all the manure at the barn windows must have been accumulated there after the plaintiff purchased the farm; and if the foregoing decisions are evidence of the law, that part of the manure never was Nason's property as between him and the plaintiff. The same suggestion may apply, though less forcibly, to the manure that was by the wayside. That portion of it, being part of the soil itself, must have passed by the deed, in the same manner as would heaps of soil, which Nason might have collected on any other part of the land described in the deed.

See *Pinkham* v. *Gear*, (3 New Hampsh. R. 484); *Parsons* v. *Camp*, (11 Connect. R. 525.)

Merrick, for the defendant. The plaintiff cannot maintain trespass *quare clausum*, because the acts done were not an injury to the freehold. Neither will trespass *de bonis asportatis* lie, because, at the time of the taking and carrying away of the manure, he had neither the possession, nor the right of possession. *Vincent* v. *Cornell*, (13 Pick. 294); *Walcott* v. *Pomeroy*, (2 Pick. 121); *Wheeler* v. *Train*, (3 Pick. 255.) All the cases seem to admit, that manure is personal property; but for the sake of convenience, and the good of agriculture, some of the judges have determined, that it passes with the land by a deed of conveyance of the latter, and that, as between landlord and tenant, the former is entitled to it without contract or covenant to that effect. It is difficult to see upon what principle this can be. Agriculture will be equally promoted, whether the manure be expended upon the farm on which it is made or upon another. Manure is like all other productions of a farm, the result of growth, labor and cultivation, and when matured, is, like them, the property of the tenant. Thus, it may be attached as his property. *Staples* v. *Emery*, (7 Greenl. 201.) And if it may be attached and thus applied to the payment of his debts, surely he may sell it and convert it into money for the same purpose.

If he can do so, it must be because it is his; and if it be his, his landlord cannot, by conveying the land, deprive him of his property. There can be no distinction between the different parcels of this manure. It is all made, and therefore is all personal property. That a portion of it was once part of the soil of the farm can make no difference. The change has destroyed its identity. See, in addition to the cases cited by the plaintiff, *Yearworth* v. *Pierce*, (Alleyn, 31.)

The right of the tenant to remove many things during the existence of his tenancy, which, if suffered to remain till after the surrender of the estate, would pass to the landlord, has been repeatedly recognised. It would probably be so with respect to manure; and the same rule would seem to be as applicable to this subject as to many others to which judicial decisions have applied it. *Gaffield* v. *Hapgood*, (17 Pick. 192, and cases there cited.)

Metcalf, in reply. The cases cited for the defendant, to show, that trespass *de bonis asportatis* will not lie, if applicable at all, and if not a *petitio principii*, would seem to be sufficiently answered by *Farrant* v. *Thompson*, (5 Barn. & Ald. 826,) and *Ayer* v. *Bartlett*, (9 Pick. 160.)

If it be conceded by the plaintiff, that the manure might have been attached for Nason's debts, the defendant gains nothing by the concession. For a chose in action, &c. belonging to a wife, may be applied to satisfy the husband's debts, though he has not reduced it to possession. If, however, he die, not having so reduced it, his creditors cannot have the avails of it, but it will survive to the widow. This seems to be analogous to the supposed right of Nason's creditors, in this case.

Shaw, C. J. drew up the opinion of the Court. Two questions arise in the present case, the first, as to the form, the second, as to the plaintiff's right of action.

1. The tenant in this case, was tenant at will; and it seems a well settled rule, that if a tenant at will commits waste, it is a determination of the will and an act of trespass, and that *quare clausum fregit* will lie by the reversioner. *Phillips* v. *Covert*, (7 Johns. R. 1); *Suffern* v. *Townsend*, (9 Johns. R. 35.)

It was further contended, that the plaintiff had not such a possession of the manure, as would enable him to maintain trespass *de bonis asportatis*.

The plaintiff, by the purchase, had become owner of the

farm with all its incidents, subject only to the tenancy at will of Nason. If the manure became the plaintiff's at all, it was as part of and incident to the realty. Nason had a qualified possession of it for a special purpose only, that is, to be used upon the farm. The moment he sold it, the act was an abandonment of that special purpose, he parted with his only right to the possession or custody of it, it vested in the plaintiff as owner of the freehold, and the right of possession followed the right of property. *Farrant* v. *Thompson*, (5 Barn. & Ald. 826); *Walcott* v. *Pomeroy*, (2 Pick. 121); *Ayer* v. *Bartlett*, (9 Pick. 156.) As the tenant's sale conveyed no title to the defendant, the action of trespass well lies against him, if the property was the plaintiff's.

2. The Court are of opinion, that manure made on a farm, occupied by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice and the general understanding, so attached to, and connected with the realty, that, in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee. *Lassell* v. *Reed*, (6 Greenl. 222); *Kittredge* v. *Woods*, (3 New Hamp. R. 503.) The authority of the first of these cases is supposed to be impaired by a subsequent one, decided by the same court, *Staples* v. *Emery*, (7 Greenl. 201.) But the court do not profess to call in question the correctness of their former decision, but, on the contrary, affirm it and distinguish the latter case from it.

The rule here adopted will not be considered as applying to manure made in a livery stable, or in any manner not connected with agriculture or in a course of husbandry.

In the present case, the defendant had notice, both from Blake and from the plaintiff, of the claim and title of the plaintiff to the manure, before the sale; he therefore stands in the same situation with Nason, neither better nor worse.

Judgment for the plaintiff.

It is singular that this should be, as we believe it is, the

first and only case in the Massachusetts Reports, in which the rights of lessors and lessees to manure made upon a farm is discussed at length. The rule laid down by Ch. J. SHAW is sufficiently clear and explicit within its limits, and the weight of authority seems to be that way; but the ground upon which the decision of the Court is here rested, furnishes no principle applicable to cases which might be supposed to involve the same general question. It is based upon "usage, practice, and general understanding," and when its authority is invoked in another case similar in principle, if the rights of the parties to the subject-matter of litigation be governed by any principle, the extent of this "usage, practice, and general understanding," must be determined. This decision applies only, by its terms, to an *outgoing* tenant. What are the rights of other tenants? Or, in general terms, To whom does the manure made on land held by lease, belong, — to the landlord or the tenant?

To answer so general a question, it is necessary to give an opinion on several particular cases that may arise under it.

The land may be leased for agricultural purposes; or for purposes of personal occupation, or trade; the manure may be made by the cattle of the lessor, or of the lessee; and from fodder supplied by the land leased, or purchased by the lessee elsewhere; the manure may be lying in heaps, or spread upon the ground, or mixed with the soil, and the right to remove it may be claimed by a tenant in possession, or by a tenant who has gone out.

All these distinctions, however, except the first, seem immaterial. The fodder out of which the manure is made belongs to the lessee, as much if it be raised on the farm, as if it be purchased elsewhere. For the tenant pays rent for the land that he may reap the produce; and he may sell this produce or give it to his cattle, as he pleases. If the cattle belong to the lessor, they are still the property of the lessee for his term, and if the lessee is bound to feed them, and has a right to work them; if, in short, he has a special property in them during the term, their dung is his property as much as their labor. For the incident follows its principal. The claim of the lessor to the dung must rest either upon his right to the materials out of which it is made, or to the animal that elaborates them; and he has none to either during the term. *Lassell* v. *Reed*, (6 Greenl. 222.)

The other distinction, viz., the purpose for which the land is to be used, is material, for it affects the contract. If land in town is let covered by a stable, which by the lessee is filled with horses, has the lessor any more right to their dung than to their labor? What is his contract? By the lease, he demises to the lessee the land covered by the stable; the consideration of the lease is the yearly rent to be paid by the lessee; and he, yielding and paying such rent, is entitled to use the premises for any lawful purpose, returning them to the lessor, at the expiration of his term, in the same order, reasonable use and wearing excepted. By the contract, the lessor is to have his rent, and nothing more. The manure is a personal chattel, belonging, as the case may be, to the person having the property, special or general, in the animals from whom it falls. When the land is leased for agricultural purposes, the question is equally simple, but has not been as clearly treated. The English written leases seem frequently to provide for the consumption of the manure. And where they do not provide for it, custom (sometimes a very narrow custom) has been proved in litigated cases. It may be doubted whether any case which has engaged the attention of the court in England has been decided on any other ground. Williams on Executors (3d Am. ed.) 615, and cases there cited; *Beaty* v. *Gibbons*, (16 East, 116); *Carver* v. *Pierce*, (Style, 66;) *Pinkham* v. *Gear*, (3 N. H. 484); *Pindar* v. *Wadsworth*, (2 East, 154); *Roberts* v. *Barker*, (1 C. & M. 809); Harrison's Dig. "Land. and Tenant, Husbandry;" *Senior* v. *Armytage*, (Holt, N. P. 197); *Hutton* v. *Warren*, (1 Mees. & Welsb. 466.) But see *Brown* v. *Crump*, (1 Marsh. 567); *Gough* v. *Howard*, (Peake's Add. Cases, 197.)

If there be no express contract between the landlord and tenant, of land used for agricultural purposes, the law implies that the tenant use the land in a husband-like manner, and pay therefor a reasonable rent. *Powley* v. *Walker*, 5 T. R. 373; *Brown* v. *Crump*, ante. If he do this, and at the end of his term yield the land in the order in which he took it, his contract is fulfilled. To do this, he must manure the land, but he may sell the manure made on the place, and buy other; or he may dispose of part of this manure, and apply the remainder; or, if he keep few animals, he may use on the land all that they make, and other that he purchases. The test is, whether he spreads on the land as much manure as good husbandry

requires. And it would seem plain, that this implied obligation to keep the land in heart, can no more affect the tenant's property in the dung of his animals, than his obligation to keep the windows in repair can affect his property in a box of glass stored in his cellar.

By the custom prevailing in many parts of England, it is presumed, the tenant was expected to spread on the land the manure made from it. As a custom, this may in most cases be equitable, though many cases can be put, on each side, in which it would work injustice. But great weight has been given both in England and America to a remark of J. Buller, as stated by C. J. Gibbs, (1 Marsh. 567; see 1 Esp., N. P. (Pt. 2, 131) 279; *Watson* v. *Welch*, A. D. 1785,) that every tenant is bound "to consume the produce on the farm." In *Gough* v. *Howard*, Lawrence, J. quotes the same judge, as limiting this doctrine, and taking a distinction between dung and straw, admitting that straw need not be used where it grew; for the reason which must have occurred to him before, as applying to other produce, that "in that case none could ever be brought to market." The rule, thus limited, is no guide; for how much produce is a tenant bound, by his implied obligation, to spread upon the farm? All that Mr. Justice Buller could have meant, was, that the tenant, as a part of good husbandry, was bound suitably to manure the land.

It was at this point that the question was first brought before an American court, in the year 1824, between which year and the year 1850 we find decisions as noted below.

Verm. 1824, *Stone* v. *Proctor*, (2 Chip. 108); N. H. 1826, *Kittredge* v. *Woods*, (3 N. H. 503); *Pinkham* v. *Gear*, (3 Ib. 484); Maine, 1829, *Lassell* v. *Reed*, (6 Greenl. 222); 1831, *Staples* v. *Emery*, (7 Ib. 201); N. Y. 1836, *Middlebrook* v. *Cowin*, (15 Wend. 169); 1842, *Goodrich* v. *Jones*, (2 Hill, 142); Conn. 1836, *Parsons* v. *Camp*, (11 Conn. 525); Mass. 1838, *Daniels* v. *Pond*, (21 Pick. 367); N. C. 1842, *Southwick* v. *Ellison*, (2 Ired. 326.)

In these cases the law is decided in three ways, and upon different reasons, viz.

I. That the lessee has no right to sell the manure, either during his term or afterwards.

1. By reason of the custom of the country. (21 Pick. 367.)

2. Because it is part of the soil. (Chip. 108.)

3. Because it is a fixture which may not be severed by the lessee. (15 Wend. 169; 2 Hill, 142.)

4. From agricultural equity. (6 Greenl. 222; 7 Ib. 201.)

II. That it is personal property, and may be removed by the lessee during his term, but not afterwards. (3 N. H. 503; 3 Ib. 484; and perhaps 11 Conn. 525.)

III. That it is not a fixture, and is the personal estate of the outgoing tenant, which he may take before or after he leaves. (2 Ired. 326.)

From all these cases no rule of law can be extracted, but the weight of authority gives the property in the manure to the lessor. (Taylor's Landlord and Tenant, 539, 540; 2 Kent, Comm. 346, 347, notes and cases cited.) But the principle, if the foregoing reasoning be correct, gives the property to the lessee, and leaves the lessor, in case of unfaithful husbandry, his remedy upon the covenants, if there be a written lease; or his action on the case if there be none. Whatever the rule may be, it will apply equally to stable manure and to compost. (*Daniels* v. *Pond*, ante.) But the lessee may not remove soil mixed with the compost, for that belongs to the owner of the fee. (*Anon.* Popham, 38, and cases cited by Metcalf in his argument in *Daniels* v. *Pond*; *Higgon* v. *Mortimer*, 6 C. & P. 616. But, contra, *Southwick* v. *Ellison*, ante.)

We are not aware that there are any other American cases on this subject.

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Bristol, ss., October, 1853.

COMMONWEALTH *v.* PETER A. SMITH.

The omission of the words, "A True Bill," does not vitiate an indictment.

IN this case, after verdict, and before judgment, the defendant moved to quash the indictment, and in arrest of judgment, for want of proper and necessary averments

therein, "in that there is no certificate signed by the foreman of the grand jury, that the indictment was a true bill," and in that the indictment is otherwise defective, and one upon which no judgment can be had. The motion was not allowed by BISHOP, J., who tried the case in the court below, and therefore the defendant excepted.

T. G. Coffin, Esq., for the defendant.

I. An indictment not certified to be "a true bill," though signed by the foreman of the grand jury, is bad, and a verdict will not cure the defect. *Webster's case*, (5 Maine, 432); *State* v. *Elkins*, (1 Meigs, 109); *Gardner* v. *The People*, (3 Scam. 83); *Comm'th* v. *Walters*, (6 Dana, 290); *Nomaque* v. *The People*, (1 Breese, 109.)

II. The motion in arrest is seasonably made after verdict. *Comm'th* v. *Child*, (13 Pick. 198); *Webster's case*, (5 Maine, 432.)

L. F. Brigham, Esq., District-Attorney, for the Commonwealth.

I. An indictment, signed by the foreman of the grand jury finding it, and presented in open court, is sufficiently authenticated, without the words "a true bill" upon it. *State* v. *Davidson*, (12 Vermont, 300); *State* v. *Elkins*, (1 Meigs, 109); *Sparks* v. *Comm'th* (9 Barr. 354); *State* v. *Chandler*, (2 Hawks. 439); *State* v. *Cox*, (6 Ired. 440); *State* v. *Calhoon*, (1 Dev. & Bat. 374); *Comm'th* v. *Walters*, (6 Dana, 290); *State* v. *Kimbrough*, (2 Dev. 431); *State* v. *Collins*, (3 Ib. 117); *State* v. *Creighton*, (2 N. & McC. 256); *State* v. *Freeman*, (13 N. H. 488.)

II. The motion in this case, after verdict, is too late. 2 Blackf. 151; 2 Virginia Cases, 483; 8 Ham. 294; 2 Ashm. 70; *Comm'th* v. *Betton*, (5 Cush. 427.)

The opinion of the Court was delivered by

MERRICK, J. — After a verdict for the Commonwealth, the defendant moves that judgment may be arrested, for the alleged "want of proper and necessary averments in the indictment, in that it contains no certificate, signed by the foreman of the grand jury, that it is 'a true bill.'"

Upon inspection of the indictment, it appears to have been signed by the foreman of the grand jury, and countersigned by the Attorney for the Commonwealth; but the words, "a true bill," are no where found upon it. This deficiency the defendant insists is a material and fatal objection to it; — first, because these words are an indispensable part of every indictment; and secondly, because

they constitute the only recognised phraseology by which the action of a grand jury, in the due presentment of a criminal accusation, can be legally authenticated.

This position seems to be well warranted by the decisions, chiefly relied on by the defendant's counsel, of English courts; and if such an objection were made in those courts, it would undoubtedly be sustained. For there it is held, that these words are not only indispensable to make a complete and valid legal accusation, but that when indorsed upon a bill, they become incorporated with and make a material part of its allegations. This necessarily results from the peculiar course of proceeding in the allowance and institution of prosecutions upon the presentment of a grand jury in that country. Before any complaint charging a party with the commission of a criminal offence can be submitted to that body there for their consideration, it must be duly set forth and described, in a bill properly prepared and fairly engrossed on parchment. When its members have been regularly assembled, and have been sworn, charged and empowered to exercise the duties of their office, all the bills which have been previously prepared in that manner, are placed in their possession; and they then proceed to hear and consider the evidence adduced by the several prosecutors in support of their respective accusations, and thereupon to determine in respect to each particular bill, whether it shall be found or rejected. As soon as their investigations are completed, and their decision in each case made, they carry and return into court, and publicly deliver into the hands of the proper officer all the bills they have before received, including those they have rejected as well as such as they have found to be true. And in order that the two classes may always thereafter be conclusively distinguished the one from the other, they are required to indorse the words, "A true bill," upon those which they have found, and the words, "Not found," upon all which they have rejected. The indorsement of the former converts the bill from a simple complaint into a complete, formal, and effectual indictment. 1 Chitty, Cr. Law, 324; Com. Dig. Indictment, A; 4 Hawkins, P. C., book 2, ch. 23.

But our practice and course of proceeding in the prosecution of public crimes and offences, after the preliminary inquiry and action of a grand jury, are widely different, and involve no necessity for any similar indorsement, or

mark of discrimination, after their several presentments. It has undoubtedly been usual in this Commonwealth to insert the words "a true bill," at the foot of the indictment, above the signature of the foreman of the grand jury; but it may be questioned whether this form has been invariably observed. And no case has been cited or referred to, in which it has been decided in our courts that the inscription of these words upon any part of the bill is indispensable to its validity. That was not the question in the case of *Turns* v. *The Commonwealth*, (6 Met. 224.) It was there, among other things, objected, that it did not appear by the record that the indictment had been found by at least twelve of the grand jurors; but it appearing to have been certified by the foreman, in the usual manner, to be a true bill, the Court remarked that such certificate was proper evidence of the due and legal action of the jury. Certainly it was. But treating that certificate as proper and sufficient, was no affirmation that it must be held the sole and exclusive evidence of that action, or that other means of proof might not be resorted to for the purpose of showing it. These means exist, and necessarily result from the proceedings of the grand jury, in the way and manner in which their official powers and duties are exercised and performed. No formal bills are ever previously prepared to be preferred before them, as in the English practice; but they receive and act upon all complaints which any individual may think fit to submit to them, and determine in what cases accusations shall be made. In these decisions they always act for the Commonwealth, and never for a private prosecutor. Bills of indictment are drawn up by the Attorney for the government under their directions, and in conformity to their decisions. They return these, and no other bills whatever, into court, and they are the only presentments made upon which parties charged with the commission of criminal offences are arraigned for trial. The bills of indictment so returned are received by the court as official accusations of the grand jury, and placed upon its files and made part of its record. When, in addition to this course of proceeding, the indictment is verified by the signature of the foreman of the grand jury, and bearing upon its face the attestation of the public prosecutor, there is no reason why its authenticity or its character as a valid official accusation shall be afterwards brought into question.

We are aware that in other States there have been conflicting decisions upon this question. In *Webster's case*, (5 Greenl. 432,) it was held that the omission of the words, "a true bill," was a fatal error. But the same question arose some years afterwards, in the case of *The State* v. *Freeman*, (13 N. H. 488,) upon a similar indictment, and the court there, upon a review of the authorities, and for reasons carefully assigned, arrived at an opposite conclusion. And we think the latter decision was placed upon grounds which are satisfactory and conclusive. Certainly the principal reason suggested by the court in support of its decision in *Webster's case*, that the foreman, without the words "a true bill" prefixed to his signature, must be presumed thereby to express his own personal opinion, and not that of the jury, cannot reasonably be accepted here, when the jury are not only sworn to keep their own counsel, but are expressly forbidden to state, or even to testify in a court of justice, how any one of their number voted, or what opinion he expressed in relation to any question before them. Rev. Stat. ch. 136, sec. 5, 13.

These words obviously constitute no part of the description of the offence charged in the indictment. They are not indispensable to the due and legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential, does not exist in our practice and mode of procedure; and therefore this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant.

Exceptions overruled.

Plymouth, October Term, 1849.[1]

ALDEN B. WESTON and another *v.* ALFRED SAMPSON and others.

The right of taking clams from flats lying between high and low water mark, and within one hundred rods of the upland, is, in this Commonwealth, as by the common law, a public right, and does not, by virtue of the Colony ordinance of 1641, belong exclusively to the owner of the

[1] This case will be in the next volume of Cushing's Reports.

upland. And in any town where such right has not been limited by particular statute, all the inhabitants may lawfully enter upon flats, so situated, for the purpose of digging and carrying away clams.

THIS was an action of trespass *quare clausum fregit*, originally brought before a justice of the peace; and was submitted to the Court of Common Pleas, and, upon appeal, to this Court, upon the following statement of facts.

"It is admitted that the plaintiffs are the proprietors of the tract of upland described in their writ, with the flats adjoining, at Powder Point, so called, in Duxbury, bordering upon the bay. The defendants, inhabitants of Duxbury, went in their boat upon said flats, and there, at low water, dug five bushels of clams, and put them into their boat, and carried them away. The place where the defendants dug these clams was between high and low water mark, and within one hundred rods of the shore of the plaintiffs' upland. If the court shall be of opinion that the defendants had a right so to dig and carry away said clams, the plaintiffs are to become nonsuit; otherwise the case is to be sent to a jury."

The case was argued at Boston, in January, 1849.

H. A. Scudder, (with whom was *T. P. Beal*,) for the plaintiffs.

W. Baylies & W. Thomas, for the defendants.

SHAW, C. J. — The question in this case is probably one of very little importance to the parties in point of amount, but it presents a question of considerable interest to the inhabitants of the maritime districts of the State. The statement of facts is so shaped, as to present the single question of the right of an inhabitant of Duxbury, to enter upon the shore or flats, between high and low water mark, lying in front of land, the acknowledged property of another, and within one hundred rods of high-water mark, for the purpose of taking and carrying away clams therefrom.

The action was trespass *quare clausum*, and the facts find that the defendants did not pass over, or enter upon the plaintiffs' upland, but that they passed to the place from tide-water in a boat, dug five bushels of clams and placed them in their boat, and went away, and carried the clams in their boat. It follows, of course, that they must have gone to the spot whilst the flats were so much covered with tide-water as to float the boat, waited till low water, then dug the clams, and then waited until there was

sufficient flood-tide again to float their boat. This is the breach of the plaintiffs' close, of which they complain.

There is no doubt that, by the common law of England, all the subjects of the king have a common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris*, (Hargr. Law Tracts, 11,) that all the people of England have a liberty of fishing in the sea, as of common right, and of this they cannot be lawfully deprived even by the grant of the king. *Carter* v. *Murcot*, (4 Burr. 2162); *Warren* v. *Matthews*, (1 Salk. 357.) This was conceded by all the judges, although divided in opinion in other respects, in the case of *Blundell* v. *Catterall*, (5 B. & Ald. 268.)

And it is not at all inconsistent with this common and general right, that the king is held to be owner of the soil under the sea, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows, to ordinary high-water mark. And it has been frequently held, that the king takes this right of soil in trust for the public, so far as the fishing is concerned; and although the king may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the king's subjects, cannot be deprived of their common right. This distinction between the *jus privatum* of the crown and the *jus publicum* of the people, is strongly stated by Lord Hale, *De Portibus Maris*, and is confirmed in recent cases of high authority. *Attorney General* v. *Burridge* (10 Price, 350); *Attorney General* v. *Parmeter*, (Ib. 378); *Parmeter* v. *Attorney General*, (Ib. 412.)

In some of the cases, it has been held that one may have an exclusive right of fishing in an arm of the sea; but this is not so *primâ facie*, and must be proved by ancient grant; and it has been repeatedly held that such right cannot be founded on the king's grant, made within time of memory; and that no such right could be conferred by authority of the crown, under Magna Charta. 2 Bl. Com. 39; *Warren* v. *Mathews*, (6 Mod. 73); *Somerset* v. *Fogwell*, (5 B. & C. 884.)

The right of fishing in the sea, and in bays, arms of

the sea, and in navigable or tide waters, under the free and masculine genius of the English common law, is a right public and common to every person. 3 Kent, Com. (6th. ed.) 413. The same doctrine is stated and enforced by a large citation of authorities in 2 Dane Ab. 690, and in Ang. on Tide-Waters, (2d ed.) 125, *et seq.*

In stating the principles, that by the common law the right of fishing may be public, although the soil in which it is used is private property, it is proper to add, that this public right may be regulated and abridged by the legislature, who have the control and guardianship of all public rights; in England this is often done by act of parliament, regulating ports and harbors, and authorizing wharves, docks, and other erections, which to some extent may abridge the public right of fishing. This is usually done in consideration of greater public good expected from such inclosures. *The King* v. *Montague*, (4 B. & Cr. 598.)

This common and general right of fishing in the sea and its shores, at common law, being established, we think it is equally well determined by authorities, that this right extended to shell-fish as well those which are embedded in the soil as those which lie on the surface. *Bagott* v. *Orr*, (2 Bos. & Pul. 472); *Martin* v. *Waddell*, (16 Pet. 414); *Peck* v. *Lockwood*, (5 Day, 22.)

Assuming that this was a common law right for all English subjects at the time of the emigration of our ancestors, we have no doubt, that by the charters of Charles I. and James I. under which the land of the Colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and the sea-shores, with the incidental rights of fishing, were granted to the colonists. It is unnecessary to inquire, whether the *jus publicum*, so far as general control and protection were concerned, remained to the crown or not; all the right, both to the soil under the sea, as far as by the law of nations, one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the States. *Pollard* v. *Hagan*, (3 How. 212); *Gough v. Bell*, (1 Zab. 156.)

If, then, the right of fishing on the shores of the sea, including the right to take shell-fish from the soil, was a common law right, extending to the English colonies generally, and especially to Massachusetts, the question is, whether any thing has been done by the colonial or provincial government, or by the government of the Commonwealth, to impair or abridge that right.

Though the laws of the colony of Plymouth have been published within a few years, we believe that they contain no provision bearing on this subject. But the Colony Ordinance of 1641 is relied on, and, we believe, mainly relied on, as giving to owners of land bounding on tide-waters "propriety" or the right of soil so far as the tide ebbs and flows, where it does not ebb more than one hundred rods. The premises, in which the trespass in this case is assigned, lie in the town of Duxbury, within the limits of the old Colony of Plymouth, and were not within the territorial jurisdiction of the Colony of Massachusetts, when the ordinance in question was passed; and therefore that ordinance, as positive law, did not, *proprio vigore*, extend to this territory. But the great principle established by the colony ordinance, extending the right of soil of the upland owner to low-water mark, has been held to extend by long usage to Maine; *Storer* v. *Freeman*, (6 Mass. 435); *Codman* v. *Winslow*, (10 Ib. 146); *Lapish* v. *Bangor Bank*, (8 Greenl. 85); to Plymouth, *Barker* v. *Bates*, (13 Pick. 255); and to Martha's Vineyard, *Mayhew* v. *Norton*, (17 Pick. 357); though all of these were under other territorial governments at the time the colony ordinance was passed. We have no doubt, therefore, that the plaintiff, as riparian owner, has the same proprietary interest in the soil as if it were within the old territory of Massachusetts.

But although the riparian proprietor has an interest in the soil, it is not an absolute and unqualified ownership; but so long as flats so situated are left open, unoccupied by any wharf, dock, or other inclosure, so long as the tide ebbs and flows over them, they so far retain their original character and remain public. This double rule, to which the territory lying between high and low water mark may be subject, is not a novelty in the law, but an old and recognised principle. In *Sir Henry Constable's case*, (5 Co. 107,) it was held, that when the tide was up, the place, and acts done upon it, were within the jurisdiction of the admi-

ralty; when bare, being within the body of the county, the common law had jurisdiction. It is quite certain, we think, that the mere fact, that the *jus privatum*, or right of soil, was vested in an individual owner, does not necessarily exclude the existence of a *jus publicum*, or right to the fishery in the public. The rule, established by usage and judicial decision, has been, that although the ordinance transfers the fee to the riparian owner, yet until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not disseize the owner. *Austin* v. *Carter*, (1 Mass. 231.)

This court are therefore of opinion, that where flats are left wholly open to the natural ebb and flow of the tide, unoccupied and uninclosed by the upland proprietor, the right of fishing on the part of the public is not excluded; and that the law, in this respect, makes no difference bebetween shell-fish, and swimming or floating fish. See *Parker* v. *Cutler Mill-dam Co.* (7 Shep. 357.)

The only remaining question is, whether there is any other statute provision in force, which may take away or change the right, claimed by the defendants, to take clams in Duxbury. By Rev. Sts., c. 55, §§ 11, 12, all persons are prohibited from taking oysters from their beds, unless by permits there specified, with an exception that every inhabitant may take oysters, without a permit, for the use of his family. The shell-fish taken in this case were not oysters, nor does it appear that they were not taken by the defendants for the use of their families.

Section 13 prohibits the taking of other shell-fish, but it is limited to certain towns, of which Duxbury is not one. It was a revision of former particular acts. All these also contain a proviso that they shall not prevent any fisherman from taking any quantity of shell-fish he may want for bait, not exceeding seven bushels at one time.

With these views of the law, the Court are of opinion, upon the facts stated, that the action cannot be maintained. *Plaintiffs nonsuit.*

THE PRESIDENT, DIRECTORS & CO. OF THE LECHMERE BANK, by LEWIS HALL and others, *v.* EDMUND BOYNTON and others.

THE PRESIDENT, DIRECTORS & CO. OF THE LECHMERE BANK, by EDMUND BOYNTON and others, *v.* LEWIS HALL and others.

The charter of a corporation is a grant by the government, by whose authority alone such a franchise can be claimed, and the act of the legislature is the sole authentic evidence of the extent and limits of such franchise.

A grant of such franchise may be made by certain description, as by clear and definite reference to a subscription, or articles of association, as well as by name, and then parol or other evidence *aliunde* is admissible to show who was intended.

But if legislative bodies may grant corporate franchises to persons by a general description in some degree doubtful and uncertain, as *e. g.* To all who have subscribed for stock, in a corporation for which a charter is asked, — the Court will not construe a particular grant as made to sets of persons designated by a description so doubtful and uncertain, as to render it difficult to prove who are intended as grantees, unless the intent of the legislature is clear and explicit.

In acts of incorporation, the term "associates" may have more than one meaning. They may be either persons at the time acting with those named and represented by them, or persons, who may thereafter come in to be associates, and as such, members of the corporation.

But although both classes might, in pursuance of the charter, become members of the corporation intended to be constituted, it would be by different modes, and with different rights and powers.

The latter class come in by a compact between themselves and the corporation, one of the corporate powers being to receive associates, and they cannot become associates until after an organization has been effected, and cannot act in the organization although invited to do so by some, or a majority of the individual grantees, or summoned to attend by the notice calling the first meeting. (Rev. Stat. ch. 44, § 3.) And if persons are included in an act of incorporation as grantees of the charter under the name of "associates," they must be those who were actually associates, and could be properly designated, identified, and ascertained to be such at the time of the passing the act.

Until other associates are admitted by the corporation when organized and qualified to act, only those who are made members by the charter can act, and they will have an equal voice and vote in the organization, though the subsequent vote of the corporation, declaring the number of shares each shall be entitled to, properly passed and recorded, is conclusive as to their future interest. Such grantees may admit others to take shares, and if they consent by becoming stockholders, this is recorded, and they become associates and members to all intents and purposes with the original grantees.

And if persons, not grantees, are allowed to act and vote at the first meeting, without objection, the vote is duly recorded as the vote of those entitled, and when stock is afterwards assigned to them indiscriminately with the grantees and entered on the books, it is the act of the corporation under their power to admit associates, and the organization is valid.

Where certain persons, describing themselves as inhabitants of a certain place, and representing that it would be for the interest of its inhabi-

tants and the public that a bank should be located there, petitioned that they might be incorporated for the purpose of establishing a bank at that place, and an act was passed, enacting that three persons named, being the three first signers of the petition, "their associates and successors, are hereby made a corporation, by the name, &c., to be established in" that place: it was *held*, that the court would judicially take notice of the custom of the legislature, in granting acts of incorporation, to name the three first persons named in the petition, and to enact that they, their associates and successors, should be the corporation, it being the manifest policy of the State that banking companies shall consist of a large number of responsible persons known to the legislature; and that by the term associates, *primâ facie* was intended those who were associated with them as petitioners, there being nothing to show that the legislature intended to pass any other act than that prayed for.

Certain subscription books were prepared at a meeting of the projectors of the bank, the subscribers to which agreed to take shares for the purpose of forming a banking association in that place, and to pay for the same as required by the directors when chosen; which books were circulated in different places, the signers had no means of knowing who subscribed, and most of the petitioners did not know of the subscriptions; and the notice of the first meeting, issued by one of the persons named in the act, was addressed to the petitioners and all other persons interested; and it being contended that the subscribers in these books were the associates contemplated, it was *held*, that these circumstances did not affect the *primâ facie* evidence that the petitioners were intended; that the undertaking of the subscribers, even if valid and binding as a contract, which was doubtful for want of consideration and reciprocity, gave them no power to act in the organization or otherwise, as associates and members of the corporation, until received as such by it when organized after being qualified to act as a corporation; that the power of the person giving the notice was only to call a meeting of the persons incorporated, who were fixed by the act, and that their number could not be enlarged or diminished by such notice.

The effect of interlocutory proceedings before the legislature on the construction of their enactments.

THESE were applications for leave to file informations in the nature of a *quo warranto* under stat. 1852, c. 312, § 42–50, by parties respectively claiming the franchise granted by an act incorporating the Lechmere Bank, at East Cambridge. (Stat. 1853, c. 241.)

In the first-named case, the following petition was filed during the March term of the court in Suffolk county, in the year 1853.

"To the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts: Humbly shew your applicants, the President, Directors and Company of the Lechmere Bank, that by an act of the Legislature of said Commonwealth, approved on the 28th of April now last past, Amory Houghton, Edmund Boynton, Frederic Kidder, and their associates and successors, were incorporated by the name of the President, Directors and Company

of the Lechmere Bank, to be located in East Cambridge, in the county of Middlesex, being a part of the city of Cambridge. That afterwards, at a meeting of the petitioners for said act, called and notified in the manner provided by law, and held on the fourth day of June current, the Corporation created by said act was legally organized, and Amory Houghton, Lewis Hall, Francis Draper, Thomas Dana, Samuel Slocumb, all of Cambridge aforesaid, and K. S. Chaffee, of Somerville, in said county, and Amos C. Sandborn, of Boston, in the county of Suffolk, were duly chosen Directors thereof. And thereafterwards, to wit, on the 10th of June instant, the said Board of Directors elected Lewis Hall President of said Bank.

"And so your petitioners aver, that they are a Corporation legally established and organized, and have the right to hold, and exercise and enjoy the franchise, powers and privileges granted by said act of incorporation undisturbed, and without molestation, interference or intrusion, and no persons other than the above named Hall, Houghton, Dana, Draper, Slocumb, Chaffee and Sandborn, have any right in law to hold or exercise the office of Directors of said Corporation.

"And no person, other than the said Hall, has any right in law to hold or exercise the office of President of said Corporation.

"And they further represent, that Edmund Boynton and J. M. Doe, both commorant of Lexington, in the said county of Middlesex, and Frederic Kidder, Caleb Hayden, and N. W. C. Jameson, all of Cambridge aforesaid, have illegally, and against the right of your applicants, intruded themselves into the office of Directors of said Lechmere Bank, and have assumed to hold and exercise, and still do hold and exercise the rights, powers and duties of Directors of said Bank, claiming the right so to do under the act of incorporation aforesaid.

"And the said Boynton has intruded himself into the office of President of said Bank, and has assumed to hold and exercise, and still does hold and exercise the rights, powers and duties of President of said Bank.

"And the said Boynton, as President, and the said Doe, Kidder, Jameson and Hayden, as Directors, have and still do, without right, exercise and enjoy the franchise granted by said act of incorporation.

"Whereby the private right and interest of your petition-

ers and of the Directors and members of said Corporation are injured and put in hazard.

"Wherefore your petitioners pray for leave to file an information in the nature of a *quo warranto*, in which the above named Edmund Boynton, Joseph M. Doe, Frederic Kidder, Caleb Hayden, and N. W. C. Jameson, may be called upon to show by what right they have intruded themselves into the office of Directors of said Lechmere Bank, and exercise and claim to exercise the rights, powers and duties of that office, and that the said Boynton may be called upon to show, by what right he has intruded himself into the office of President of said Bank, and claims to exercise the rights, powers and duties of the said office, and that the said Boynton, as President, and the said Doe, Kidder, Hayden and Jameson, as Directors, may be called upon to show by what right they exercise and enjoy the franchise granted by said act of incorporation before mentioned.

"And your petitioners further ask that, until a hearing and final decision on said information shall be had, an injunction may issue against the said Boynton, forbidding him from exercising the rights, powers and duties of President of said Bank, and against the said Boynton, Doe, Kidder, Hayden, and Jameson, forbidding them from exercising the rights, powers and duties of Directors of said Bank, and from enjoying the franchise granted by the act of incorporation before mentioned and for general relief.

"The President, Directors and Company of the Lechmere Bank, by Lewis Hall, President, and Amory Houghton, Thomas Dana, Francis Draper, Samuel Slocumb, K. S. Chaffee, and A. C. Sandborn, Directors."

An order of notice issued on this petition, and the respondents appeared, and filed an answer setting forth the facts on which they relied in defence, and claiming the right to exercise the franchise in question, and the petitioners filed a replication.

A hearing was had before METCALF, Justice, who granted leave to file the information, and an injunction in accordance with the prayer of the petition. The respondents then filed a similar petition as "The President and Directors of the Lechmere Bank, in their own behalf as well as that of said Corporation," praying for leave to file an information against the petitioners in the first case, and for an injunction. It was then agreed between the parties,

that the judgment rendered as above stated should be stricken off and the injunction cancelled; that both applications should be referred by a single judge to the whole court, at the October term in Middlesex county; that the facts should be heard by a Master and reported to the whole court, his report on the facts to be final, and that the decision of the court on the question of granting leave to file information should settle the controversy, and decrees for releases be made to effect this. But that if the full court should refuse to hear the applications and send the parties to a single judge, the record in the first case should be restored, with leave to the petitioners to file an information.

The case was accordingly referred to William J. Hubbard, Esq. Master in Chancery. And his report stated the following facts, together with other facts not deemed material to be stated here.

On or about the fifteenth of January, 1853, the legislature then being in session, Frederic Kidder, Amory Houghton, Edmund Boynton, and Nathan W. C. Jameson, held a meeting at the Triton Insurance Office in Boston, for the purpose of taking preliminary steps towards the establishment of a Bank in East Cambridge. At said meeting it was decided that a petition should be drawn up, and signed by the parties then present, and after being circulated for the purpose of obtaining additional signatures, should be presented to the legislature; it was also further unanimously agreed at the same time, that books should be uniformly headed, and put in circulation by the several persons then present, for the purpose of obtaining subscribers to the undertaking.

A petition was prepared, substantially the same as that hereinafter set forth; and was signed at said meeting by said Edmund Boynton, Amory Houghton, and Frederic Kidder; and by general consent said petition was delivered to the said Houghton for the purpose of obtaining additional subscriptions.

At the same meeting, six books were prepared, for the purpose of obtaining subscriptions to the stock of the proposed bank,—each of which had the same heading, and in the following words:

"We, the subscribers, agree to take the number of shares annexed to our names, individually, for the purpose of forming a Banking Association in East Cambridge, and

agree to pay the same at such time, and in such instalments, as the Board of Directors, when chosen, shall specify."

At said meeting a subscription was commenced on four of said books, and it was also agreed that each one of the four should take one of the books to procure subscriptions to the same, and that Lewis Hall, Francis Draper, and J. M. Doe should be invited to take books for the like purpose. Inquiry was made by Jameson at said meeting, whether they could depend upon having all the books kept together, and it was agreed that subscribers to the books should stand alike.

One of the six books prepared at the Triton Office, together with two other books, afterwards prepared, were circulated by said Houghton, Lewis Hall and Francis Draper, principally in East Cambridge.

The next day, or the next but one after the aforenamed meeting, Houghton met Boynton, and told him there was a word left out in the petition which they had signed, and he would have a new copy made. A new copy was prepared, and presented by Houghton to Boynton without any signature. Boynton requested Houghton to sign it first, which he did, and Boynton signed it next. Said petition, of which the following is a copy, was presented to the legislature.

"*To the Honorable the Senate and House of Representatives of Massachusetts, in General Court assembled.*

"The undersigned, inhabitants of that part of the city of Cambridge, known as East Cambridge, would respectfully represent that the business of that place has, within a few years, greatly increased, more particularly the business of dealing in lumber, wood and coal, as also the manufacturing of glass, stone, furniture, metals, and various other articles, and that it would be for the interest of the place, and the public generally, that a Bank of Deposite and Discount be located there.

"And your petitioners would respectfully ask, that they may be incorporated for that purpose of establishing a Bank there, with a capital of two hundred thousand dollars, with the same powers and privileges, that have been granted to other Banks in this Commonwealth, and as in duty bound, will ever pray.

"*Cambridge, January* 15, 1853."

Five of the persons who signed said petition did not subscribe for stock in the proposed Bank, and a large majority reside in East Cambridge, although some were residents of other places.

The said petition was referred by the Legislature to the joint committee on Banks and Banking.

Some individuals, finding that a much larger amount of stock had been subscribed for in Boston than in East Cambridge, being desirous that the control of the proposed Bank should be in the hands of persons residing or doing business in East Cambridge, caused a memorial, of which the following is a copy, to be prepared, addressed to the aforenamed committee; which was signed by several of the original petitioners, and also by other persons not petitioners, which memorial was presented to the committee.

"*To the Joint Standing Committee on Banks and Banking in the Legislature of Massachusetts.*

"Gentlemen,—The undersigned citizens of Cambridge, and whose places of business is at East Cambridge, and whose names are borne on a petition now before the Legislature for a Bank with a capital of two hundred thousand dollars, to be located in East Cambridge, are of the opinion, upon more mature consideration, that a Bank with one hundred thousand dollars will for the present accommodate the business of that village, and that it is desirable to have the proposed Bank owned and managed by citizens of the place; and for the accommodation of the business of the place, they ask that the capital may be fixed at that sum."

The following counter memorial was also signed by others of the original parties, and by other parties, and was likewise presented to the committee.

"*To the Honorable the Joint Standing Committee on Banks and Banking of the Legislature of Massachusetts.*

"The undersigned, residents of East Cambridge, in the city of Cambridge, respectfully represent, that a Bank with a capital of two hundred thousand dollars, as prayed for by the original petition of A. Houghton and others, will best subserve the interests of the public, as well as those more directly concerned in the establishment of the Bank.

"*Cambridge, Feb.* 9, 1853.'

Both sets of subscribers were notified by the commit-

tee to attend before them, and were respectively heard by counsel in their behalf.

The eight subscription books herein before-mentioned, were produced before the committee, and were examined, it being a rule of the committee that a list of the subscribers, and the subscription books should in all cases be produced.

A great number of petitions was before the Legislature, asking for the creation and increase of Bank capital to a large amount. The committee of the Legislature endeavored to reduce the amount as much as possible, and in the case of the Lechmere Bank, as the parties who appeared before the committee differed in their views as to the amount which they desired should be allowed them, the committee reported a bill 'to incorporate the Lechmere Bank in Cambridge,' with a capital of one hundred thousand dollars.

The only part of the act which is entitled "An Act to incorporate the Lechmere Bank," material to this case, is a portion of the first section, which is as follows:

"Amory Houghton, Edmund Boynton, Frederic Kidder, their associates and successors, are hereby made a corporation, by the name of the President, Directors and Company of the Lechmere Bank, to be established in that part of Cambridge called East Cambridge."

A notice signed by Amory Houghton, the person first named in said act, was duly published, that "a meeting of the petitioners for said act, and all other persons legally interested therein, would be held on the fourth day of June (then) next, at three o'clock in the afternoon, at the Lechmere House in Cambridge, in the county of Middlesex, for the purpose of accepting the said act, organizing the Corporation, adopting a code of By-laws, and transacting such other business as might come before them."

At said first meeting, a large number of those who had signed the said books of subscription, and who were not petitioners, were present, and claimed the right to take part in the organization of the bank, as associates with the persons named in the charter, and this they were invited to do by Messrs. Boynton and Kidder, two persons named in the act, the third (Mr. Houghton) not being present. On the other hand, it was contended by a portion of the petitioners present, that those only who had signed the origi-

nal petition to the Legislature, had a right to vote in the organization of the corporation. Whereupon both parties proceeded simultaneously to effect an organization of the meeting, by making choice of separate chairmen and clerks, and each voted to accept the act of incorporation. At this stage of the proceedings, those who claimed that the petitioners only had a right to take part in the organization, being nineteen in number, and a majority of petitioners present, voted to adjourn to an adjoining room, where they admitted new associates, and opened a new stock book, to which, including the petitioners, the whole subscription amounted to $52,300; and thereupon proceeded to organize the corporation, by choice of directors and officers; and it was admitted that they duly effected a legal organization, if by law under the above facts, and the other facts found by the Master, it was competent for them so to do.

The said Boynton and Kidder, and a minority of those who had signed the petition, together with those who were not petitioners, but had signed certain books of subscription, referred to in the Master's Report, all of whose subscriptions, amounted in the aggregate to $102,300, remained and duly effected an organization of said corporation, if by law under the facts herein stated, and those found by the Master, they were competent so to do.

Nineteen of the original petitioners for a charter, when they signed the petition were ignorant of the meeting at the Triton office when they signed the same — one of them never subscribed for stock — one did not subscribe for stock till after the meeting called to accept the act — fifteen of the said nineteen who also subscribed for stock, were ignorant of subscription books for stock being circulated in Boston when they themselves subscribed for stock — and the same number signed the first memorial.

It was admitted that all the signatures in all the subscription books were genuine and *bonâ fide*.

The cases were argued before the full Court on the Master's Report.

R. Fletcher, & *O. H. P. Green*, for Lewis Hall and others, cited *Ellis* v. *Marshall*, (2 Mass. 269); *Rex* v. *Askew*, (4 Burr. 2199); *Lexington & W. C. R. R. Co.* v. *Chandler*, (13 Met. 315); *Day* v. *Stetson*, (8 Greenl. 365); *Penobscot Boom Co.* v. *Baker*, (16 Maine, 233); *New Bedford & Bridgewater Turnpike Corp.* v. *Adams*, (8 Mass. 141); 1 Mass. Special Laws, 225; 4 Ib. 366; *Taun-*

ton & S. B. T. Co. v. *Whiting*, (10 Mass. 335); *Gilmore* v. *Pope*, (5 Ib. 491); Angell & Ames on Corp. (2d ed.) pp. 13, 14, 15; *Bridgewater Acad.* v. *Gilbert*, (2 Pick. 579); *Trus. Farm. Acad.* v. *Allen*, (14 Mass. 172); *Trus. Phillips Limerick Acad.* v. *Davis*, (11 Ib. 113); *Cabot. & West Springf. Bridge* v. *Chapin*, (6 Cush. 51); *St. Luke's Church* v. *Slack*, (7 Cush. 226); *Bellows* v. *Hallowell Bank*, (2 Mason, 35); *Wallingford Manuf. Co.* v. *Fox*, (12 Verm. 308.)

Sidney Bartlett, *& George W. Tuxbury*, for Boynton and others, cited together with some of the authorities above given, Ang. & Ames on Corp. §§ 98, 113, 517, 523; *State* v. *Tudor*, (5 Day, 329); *Overseers of the Poor* v. *Sears*, (22 Pick. 122); *Phil. Sav. Inst., Case of*, (1 Whart. 461); (Rev. Stat. c. 36, §§ 22, 33); *Med. Turnp. Corp.* v. *Swan*, (10 Mass. 384); *Gray* v. *Portland Bank*, (3 Ib. 364); *Chester Glass Co.* v. *Dewey*, (16 Ib. 94); *Hamilt. & Deansville Plank Road Co.* v. *Rice*, (7 Barb. 157); *Stanton* v. *Wilson*, (2 Hill, 153); *Kidwilly Can. Co.* v. *Raby*, (2 Price, Ex. R. 93); *Salem Mill-dam Corp.* v. *Ropes*, (6 Pick. 23); *Central Turnpike Corp.* v. *Valentine*, (10 Ib. 142); *Miner* v. *Mech. Bank of Alex.* (1 Peters, 46); 5 Alabama, 786.

The opinion of the Court was delivered by

Shaw C. J. — These are not, as the titles would seem to import, the same corporation against two parties, but exactly the reverse; each is instituted by a party of individuals, claiming to be the true corporation adversely to the other. The real question is, whether the company, of which Hall has been chosen president, is the duly organized corporation under the Act, (Stat. 1853, c. 241,) being an Act to incorporate the Lechmere Bank, in Cambridge, and entitled to enjoy the franchises and exercise all the powers of a banking company, according to the laws of this Commonwealth; or whether the company, of which Boynton has been chosen president, is such true and legitimate corporation. Taking the facts, as reported by the Master, according to the agreement of the parties, it seems to us quite clear, that the proof of either party would be quite sufficient to establish a due and legal organization under the charter, but for the facts tending to establish a superior claim on the part of the other party. But as two different corporations cannot be legally organized and constituted under one act of incorporation, it is manifest that any proof, whether strong and

decisive, or barely preponderating, which establishes the legality of the one, must necessarily negative the legality of the other.

The first question to be decided is, Who are the persons incorporated? and this must depend, in the first instance, on a careful consideration of the charter, which is a grant by the government, by whose authority alone such franchise can be claimed, of the extent and limits of which, the act of the legislature is the sole authentic evidence. By the act of incorporation, Amory Houghton, Edmund Boynton, Frederic Kidder, their associates and successors, are made a corporation, &c. In acts of incorporation the term "associates" is ambiguous, and may have more than one meaning, and it becomes necessary to distinguish between the different classes, who under the term "associates" may be members of a corporation. They may be either persons now acting with those named, and whom those named represent; or they may be persons, who may hereafter come in to be associates, and as such, members of the corporation. And in many of the old acts of incorporation, when the legislature were less sparing of words, the phrase was, after naming certain individuals, "those who have already associated, or may hereafter associate with them." But although both classes might, in pursuance of the charter, become members of the corporation intended to be constituted, yet it would be by different modes and with different rights and powers.

It must be borne in mind, that the purpose of an incorporation, is to create an artificial person and body politic, to consist of a number of natural persons, associated and bound together by a name, which shall have identity and continuance, either in perpetuity or for a certain time, although every individual may change, and that frequently. But the act gives efficacy to the corporation thus constituted, not only at its outset but also during its whole continuance; it therefore confers these corporate powers, not only upon all those to whom the franchise is first granted, but upon those who, under the name of "associates," "successors," or "assigns," coming into these relations afterwards in the orderly way, provided by the charter and by-laws, constitute the corporation.

It is manifest, therefore, that the term "associates" may mean those who are already associated with the persons named, or those who may come in afterwards. The term

"associates" may therefore in such an act of incorporation have an appropriate place, although, used in this latter sense, it cannot mean persons intended as original grantees of the charter. The question now is, Who were those original grantees, or in other words, who were the persons to whom, by this description, it was intended to grant the franchise of being a banking corporation? We are not prepared to say that a grant may not be made to certain persons, by a certain and definite description, as well as by name, and when such words of description are used, it is always competent to go into parol or other evidence *aliundé*, to ascertain the person or thing embraced in the description. Even when a grant is made to one by name, and it turns out that there are two or more persons of the same name, it is in the nature of a latent ambiguity, and evidence *aliundé* is admissible.

In the first charter of a bank in this Commonwealth by which the Massachusetts Bank was established, (Stat. 1783, c. 25,) is an instance, where the grantees are designated partly by name and partly by description. It contains a preamble setting forth the advantages expected from a bank, and that many persons had subscribed thereto, and further, that William Phillips, and five other persons named, *in behalf of such subscribers* have applied for an act; it then proceeds to enact, that William Phillips and the five others named, together with all those who are, or those who shall become, proprietors, &c. shall be a corporation. Here one subscription being definitely referred to, would be competent evidence, and would identify and distinguish the persons intended, as those on whom the franchise was conferred, as if they had been named.

So if articles of association were drawn up and signed, by which they had agreed to unite in applying for an act of incorporation, and an act should be passed conferring corporate powers on two or three of the first named, and their associates, referring to such articles, this would make the articles evidence, and make the act apply to all the parties there named, conformably to the maxim, *Certum est quod certum reddi potest.* The question in all such cases is what the legislature intended, — it is a question of the construction of their words. Even if the parties to the enterprise had an understanding between themselves, which was not communicated to the legislature, or not acted upon by them, either in the words of their act, or referred to in it

by necessary or reasonable implication, such understanding cannot aid in construing the act.

Supposing, then, that others besides the persons named may be original grantees of the franchise and benefits of the charter, and evidence out of the act itself is competent to show who were included in this charter under the term "associates," the question recurs, whether signers of the books, who were not signers of the petition, are included.

Association *ex vi termini* implies agreement, compact, union of mind, and purpose and action. When, as above stated, it includes those who are to come in afterwards, either together with or as successors to the original grantees, it is by a compact, between the party who desires to come in, on the one hand, and the corporation who consents to receive him, on the other. One of the powers granted, is to receive associates and provide for a succession of members. But the right to receive associates is a corporate right, to be exercised like other corporate powers, by a majority, if not otherwise regulated. But the exercise of a corporate right presupposes a previous corporate organization, and therefore, until such organization, there can be no such associates, and therefore no such one can act in the organization, although invited to do so by some, or even a majority of individual grantees. If, therefore, there are persons included in the act as grantees of the charter, under the name of "associates," they must be those who were actually associates, and could properly be designated, identified, and ascertained to be such, at the time of the passing of the act of incorporation.

We think it is clear, that the right to establish this bank was not conferred on the three persons named only; and it is not seriously contended that it was so. In this act, as well as in most others for establishing banks, passed at the same session, three persons only are named, even where the capital was $1,500,000. And in various other acts of incorporation, three persons only are named. And yet it is the manifest policy of the Commonwealth, in granting banks, so important to the interests of the community, furnishing, as they practically do, the currency of the Commonwealth, that the banking company shall consist of a large number of known and responsible persons, known to the legislature, in order that the best security shall be had that the currency thus to be furnished shall be a sound one. We think, therefore, that we may judicially take notice of

a custom, adopted now for a number of years in the legislature, in granting acts of incorporation, to name the three first persons named in the petition, and to enact that they, their associates and successors, shall be the corporation. This expedient has probably been adopted with a view to shortening these acts as much as possible. Here the petition is before us, and it appears that though there are between twenty and thirty signers, the three first only are named in the act, their associates and successors.

From the evidence, the court are of opinion, that by the term "associates," after naming the three first, *primâ facie* the legislature intended those who were associated with them as petitioners. We have already suggested, that by the natural import of the word "associates," is understood persons united, acting together by mutual consent, by compact, to the promotion of some common object. The joining together, by signing and presenting one petition, for the promotion of one object, is the joint and united act of each and all the petitioners. They describe themselves as inhabitants of East Cambridge, and pray that they may be incorporated for the purpose of establishing a bank at that place. The prayer is not, that they and *their* associates may be incorporated, — not in behalf of themselves and others; these would imply persons other than the petitioners. But the term "associates" is the language of the legislature, not of the petitioners; and describes Houghton, Boynton and Kidder, and *their* associates, the associates of the three. The term is fully satisfied by making it apply to the petitioners, who in fact are associated with Houghton, Boynton and Kidder, in petitioning for precisely such an act. There is no intimation from any report or document, or from any evidence whatever, that the legislature intended to pass any other act than that prayed for; it is manifest, we think, that this charter was granted in answer to that petition. In quoting a similar act of incorporation, Parker, J., says that it was a grant or charter to the individuals who prayed for it, and those who should associate with them.

Is there any thing in the evidence before us to control and rebut this *primâ facie* presumption of fact? The party acting with Houghton insist, that the books, which were prepared at the same meeting of four individuals, at which the enterprise was first projected, and which were put into

circulation at the same time, in different places, made those, who subscribed for stock on those books, associates in the enterprise, with those who signed the petition, and that those were the associates contemplated in the charter. But we think this proposition cannot be maintained, for several reasons.

1. It is true that these books were prepared by the four persons, at a meeting, which was the germ of the enterprise, but they were to be circulated in different places; those who subscribed one had no means of knowing who had subscribed others, and there was nothing, therefore, to make the signers of these different books associates with each other. And it is found as a fact, that most of the petitioners, when they signed the petition, did not know of these subscriptions. Had they all signed on the same book or paper, declaring the intended enterprise, it might have been regarded more plausibly as an article of association, and referred to by the legislature.

2. But the heading to their books, which was alike in all, did not amount necessarily, perhaps by its import not probably, to an agreement, to join in obtaining or procuring a charter for a bank; but it was an agreement to take shares for the purpose of forming a Banking Association, to be established in East Cambridge, and to pay, &c. This might be fairly contended to be a provisional undertaking, to take shares in such a bank, when granted and organized, and in a condition to receive associates and fill up its stock. This undertaking, even if it is valid and binding as a contract, which is doubtful for want of consideration and reciprocity, would give them no power to act in the organization, or otherwise as associates and members of such corporation, until received as associates by the corporation when organized, after being qualified to act as a corporation. Until this is done, those only who are made members by the act of incorporation can be deemed capable of acting; and as the act makes no distinction amongst its grantees, as to the number of shares they shall respectively hold, they shall have an equal voice and vote, as if each held an aliquot part of the whole stock, according to the number of grantees of the charter. But when organized, they may, and commonly do pass a vote, declaring how many shares each shall take, and this being entered on their books, which constitute the authoritative record of the

doings of the corporation, shall be deemed a corporate act, and be conclusive.

So, as they have the whole authority and property in themselves, they may share it with others, by admitting them to take shares, and thereby diminish their aggregate amount of stock, *pro tanto;* and if those others consent to it by becoming stockholders, this is also entered on their books, and they become members to all intents and purposes, with the original grantees. They become associates *de facto* then, and within the terms of the charter, members. *Gray* v. *Portland Bank*, (3 Mass. 364.)

3. The petitioners, who ask for the grant, by their petition, ask it for themselves; they recite the advantage to East Cambridge as a moving cause, addressed to the legislature, and describe themselves as inhabitants of East Cambridge; whereas if it had been intended that all the signers of the books, who were engaged to take stock, were intended and expected to be original grantees of the charter and franchise, and not to come in as takers of stock afterwards, there seems no reason why they should not have joined in the petition, and described themselves as inhabitants of East Cambridge, and various other places.

4. If we examine what took place before the legislative committee, it rather tends to strengthen the conclusion, that the legislature, by their act, intended the other petitioners, and not the signers of the books, as the "associates."

We had supposed it not usual to address memorials to a committee of the legislature, but that the proper course was, to address them to the two houses, and that through them they were sent to the committee. But this informality, if it be one, is of no importance. The first was signed by Houghton and others who had signed the petition, reciting their pending petition praying for a bank with a capital of $200,000, and now intimating that a capital of $100,000 would, for the present, accommodate the business of that village, and that it is desirable to have the proposed bank owned and managed by citizens of the place, they now ask for the smaller capital.

The signers of the counter-memorial, desiring the capital to be $200,000, according to the original petition, describe themselves as residents of East Cambridge. Several of them were not signers of the petition, nor inhabitants of East Cambridge; this, perhaps, is of no other importance,

than that it implies a consciousness on their part, that the contemplated bank was intended for the special accommodation and benefit of that place and its inhabitants, and that it should be so understood by the legislature.

The legislature, by granting the bank of the smaller capital, as far as this proceeding could have any effect, sanctioned the views of the petitioners.

We attribute very little force and effect to this evidence. In general it would be unsafe to go into the interlocutory proceedings before the legislature, to ascertain what they intended, by any act of legislation; in general, the construction must be obtained from the words of the act, in reference to the subject-matter and the surrounding circumstances, and with due regard to other acts in similar cases. But, we think it quite clear, that these proceedings have no tendency to contradict or vary the construction which, on other grounds, we put on the act, nor to favor a different construction.

Some consideration, perhaps, may be supposed to be due to the fact, that the notice for calling the first meeting, signed by Amory Houghton, was addressed to the petitioners for said act, and all other persons interested therein, which includes persons other than the petitioners. But we think this circumstance of no weight.

This notice was not issued in pursuance of any provision in the Act itself, for there was none, but under a provision in Rev. Stat., c. 44, § 3, which provides, that the first meeting of all corporations shall, unless otherwise provided for, be called by a notice signed by any one or more of the persons named in the act of incorporation. This was purely a ministerial act. His power and authority was, to call a meeting of the persons incorporated, and did not extend beyond. Any attempt to carry it further was wholly void. The persons thus incorporated were fixed by the act either by name or by description more or less definite, and the number could not be enlarged or diminished by the act of the person calling the meeting. If persons other than petitioners were not included in the act, the call for the meeting, whatever were its terms, could give them no power. For the same reason also, as before stated, an invitation by any other of the persons named in the act, or embraced as associates, could not confer an authority to meet and vote, on others not embraced. If subscribers to books, not included in the petition, were included in the

act, they needed no such invitation; if they were not included in the grant, such invitation gave them no authority to vote.

Perhaps it may be said, that there are many instances in which, upon a similar call for a meeting to accept an act and organize a corporation, for establishing a bank, or other similar purposes, a meeting has been held, of all friends and promoters of the enterprise, without regard to the question whether petitioners or not, and that the validity of such organization has not been called in question. If it be so, which we think highly probable, it may be accounted for upon a very simple principle, that of the consent of those concerned. *Volentibus non fit injuria.* No objection being taken to the right of such persons, the vote is duly recorded as the vote of those entitled, and when stock is assigned to persons not petitioners, indiscriminately, with those who were, and entered on the books, it is the act of the corporation, under their acknowledged power to receive associates. In the present case, the objection was taken in the outset, by those embraced in the petition, claiming alone to be existing associates, and the great majority of them refused to act with those not petitioners, thereby raising the question, Who were the associates and persons incorporated? Their assent, therefore, is expressly disproved.

It is said that, upon this subject, the power of the legislature is unlimited, and that they may grant franchises, rights and powers, to persons by a general description, though in some degree doubtful and uncertain; and that in this case they might, by a change of phraseology, have granted this charter to all those who in any form had subscribed for stock. Courts of justice, we think, should be slow to believe that the legislature would grant powers and privileges so highly interesting both to public and private rights, to sets of persons, designated by a description so doubtful and uncertain, as to render it difficult to prove who are the persons intended as grantees; nor should they put such a construction upon a particular grant, unless the intent of the legislature is clear and explicit. But assuming that they have such power, and that in any particular case the persons intended, must be ascertained and identified by the best evidence which the nature of the case affords; yet, we are of opinion, that they have not done so in the present case, and that, according to the preponderating weight

of the evidence, the grant of a charter for this bank, was made to the three persons named, and those associated with them, in a prayer to the legislature, for a grant of such a franchise to them.

Perhaps this act is drawn with as much care and precaution as acts of incorporation generally are; but it is matter of regret, that, in many acts of incorporation, there is room for great doubt and uncertainty on many grounds; and it is rather matter of surprise, that there have not been more difficulties, rather than fewer, in organizing and conducting the business of corporations. One clause in the general laws, above cited, (Rev. Stat. c. 44, § 3,) authorizing any one of several persons named, to fix the time and place for the first meeting, on the regularity of which all its future meetings depend, seems to open a wide door for difficulties, especially when different parties in a corporation are struggling to gain an undue advantage. One might fix one time and place, and another another, several meetings and several organizations might be had, and it would be difficult to decide which would be regular, although it is certain that one of them only could be upheld. Perhaps, upon further consideration, the legislature may perceive the importance of providing, by more accuracy and precision in their enactments, against any such difficulty in future.

In all matters of grant, whether it be of property, or of franchises, rights, powers and immunities, whether it be by private or public act, especially when great public and private interests are concerned, it is impossible to overrate the importance of certainty in designating the subject-matter of the grant, the objects and purposes for which, and the persons to whom it is made. Certainty is the father of right, and the author of peace. Uncertainty engenders doubt, and doubt leads to controversy, litigation and strife, which it is the best purpose of all wise legislation and able and cautious jurisprudence, not only to adjust, but to prevent altogether.

A decree must be entered at the proper time and in due form, for a perpetual injunction against those who claim to act as the President, Directors & Co. of the Lechmere Bank, under the organization by which Edmund Boynton was elected President, and declaring the right of the Company of which Lewis Hall has been chosen President, to all the rights and immunities granted by said act.

Supreme Court of New York, Albany, General Term, February, 1853.

WATSON, PARKER, and HARRIS, Justices.

JONAS H. MILLER *v.* GEORGE J. FINKLE.

The statute requiring the court to limit the time of sentence of a convict, so that his imprisonment in the State prison shall expire between March and November, is merely directory, and a failure to comply with such requirement does not render the sentence void.

If, by inadvertence in passing sentence, a requirement of the statute has been overlooked, the court may correct the judgment, at the same term, and before the sheriff has proceeded to execute it. Such correction may be made by expunging or vacating the first sentence, and passing a new sentence.

The disqualification consequent upon a sentence, by which all the civil rights of the person sentenced are suspended, commences, as does the running of the time of imprisonment, from the moment of passing sentence.

The effect of vacating a sentence and pronouncing a new sentence, at the same term, is the same upon the civil rights of the defendant, as if the first judgment had been reversed on error, and the defendant had been again convicted, on a second trial.

Where a defendant was sentenced so that his term of imprisonment in the State prison would expire in December, and afterwards, at the same term, the sentence was vacated, and a new sentence pronounced for a shorter term, but so that it would expire in October, and the defendant after the first sentence, and before the second sentence, executed an assignment of his book accounts to another person, it was held that such assignment was valid.

THIS was an appeal from the County Court of the County of Columbia. The action was brought originally in a Justice's Court, to recover upon a note for fifty dollars and interest.

The defendant, in his answer, claimed the right to set off against the plaintiff's demand certain balances of account which the plaintiff had formerly owed to Peter Finkle and Calvin Finkle, and which had been assigned to the defendant before suit brought. The plaintiff recovered before the justice, and the defendant appealed to the Columbia County Court, where the cause was referred to Darius Peale, Esq., as referee, who reported nothing due to the plaintiff, and the County Court, on motion, refused to set aside the report.

On the trial before the referee, it appeared that said Calvin and Peter Finkle were on the 18th day of June, 1847, tried before the Court of General Sessions of Co-

lumbia County, and convicted of a felony, and on the day last aforesaid, were severally sentenced to imprisonment in the State prison for three years and six months. This sentence was entered in the minutes of the court. On the next day, that is to say, on the 19th day of June, 1847, the clerk, by direction of the court, made an entry in the minutes, immediately below the sentence aforesaid, expunging said sentence, and thereupon proceeded to sentence said Calvin and Peter Finkle anew for the term of three years and four months, which last sentence was entered by the clerk, and under a certified copy thereof said Calvin and Peter Finkle were taken by the sheriff to the State prison. The correcting of the sentence was made in consequence of the court discovering that the imprisonment under the sentence, as at first pronounced, could not terminate at the season of the year prescribed by law.

On the 19th day of June, 1847, after the first sentence and before it was altered, Calvin and Peter Finkle made the assignments of their accounts to the defendant; and the question presented was, whether the civil rights of Calvin and Peter Finkle were suspended at that time so as to vitiate such assignments.

E. P. Cowles, for plaintiff; *Theo. Miller*, for defendant.

By the Court, PARKER, J. — It was provided by the statute of 1836, (Laws of 1836, p. 230, sec. 6,) that in cases where convicts shall be sentenced to be imprisoned in the State prison for a longer period than two years, the court before whom the conviction shall be had shall so limit the time of the sentence, that it will expire between the month of March and the month of November, unless the exact period of the sentence may be fixed by law. The sentence pronounced against Calvin and Peter Finkle was not in accordance with this requirement. It was a sentence for two years and six months, and under it the imprisonment would have terminated in December. The defendant's counsel argues that the sentence was therefore void. But that position is not tenable. The statute is merely directory. There was no want of jurisdiction. The time for which they were sentenced was within the limit prescribed by the act for the punishment of the offence. The sentence of the 18th June, therefore, notwithstanding the neglect to comply with the requirement of the act of 1836, was binding and operative, unless it was rendered otherwise by the subsequent proceedings.

On the 19th day of June, the court, having discovered the errror, ordered the sentence which had been pronounced on the day immediately preceding, to be expunged, and the order was entered accordingly. The court then proceeded to sentence the prisoners to an imprisonment of two years and four months, a certified copy of which last sentence was delivered to the sheriff, under which they were imprisoned in the State prison. This proceeding was in effect vacating the judgment first pronounced; and it is necessary to consider whether the court had power to do so, and what was its legal effect upon the transaction in question.

The courts certainly have not the power to pardon. That is vested by the Constitution exclusively in the Executive. But courts have power over their own records and judgments, which may be exercised in certain cases and to a certain extent. This by no means infringes upon the power of pardon. The courts cannot forgive, or remit, or absolve from the consequences of a criminal judgment. But they may see that the judgment itself is in conformity to law. Thus, they may reverse on error, or review on certiorari. If, by inadvertence in pronouncing a sentence, a requirement of the statute has been overlooked, it may be corrected by the same tribunal, before further action is taken.

I think it a safe rule to lay down, that a court of criminal jurisdiction may vacate or modify a judgment at the same term at which it is pronounced, and before the sheriff has proceeded to execute it.

In *The King* v. *Price*, (6 East, 323,) the defendants had been convicted of perjury, and sentenced to imprisonment for one month, and transported beyond seas seven years. Afterwards, at the same term, the court vacated the judgment, (which Lord Ellenborough observed might be done at any time within the same term,) and passed a different sentence, viz., that each should pay £20, and be imprisoned in Newgate six months, and be afterwards transported for six years. The correctness of such a practice was also recognised by the King's Bench in *The King* v. *Justices of Leicestershire*, (1 Maule & Selw. 442,) and has been acted on in other cases. (1 Ch. Cr. L. 772.)

I think the court therefore had the right to expunge or vacate the first sentence, and to pass a new sentence; that the first sentence became void and inoperative, and the

second sentence a valid and binding judgment, — as much so as if the first sentence had been reversed on error, and the second sentence had been pronounced after a conviction upon a second trial.

The next question to be considered, is, What was the effect of the first sentence upon the assignments to the defendant? At the time those assignments were executed, the first sentence was in full force. The statute provides (2 Rev. Stat., ch. 7, sec. 19,) that "A sentence of imprisonment in a State prison, for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power, during the term of such imprisonment." This disqualification commences, as does the running of the time of the imprisonment, from the moment of passing sentence. If therefore the sentence had not been vacated, the assignments would have been void, the assignors being incompetent to execute such instruments.

But what was the effect of the vacating of the sentence? I think it was precisely the same as if the sentence had been reversed on writ of error. When a judgment is reversed, all proceedings and sales under and by virtue of it are void at common law, (6 Cow. 297; 8 Paige, 143; 2 Ib. 635,) and it has been deemed necessary to provide by statute (2 Rev. Stat. 375, sec. 68,) that in cases where the title to real estate, which shall have been sold under a judgment, shall fail in consequence of such judgment having been vacated or reversed, the purchaser shall have his action against the party, for whose benefit the real estate was sold, to recover the amount paid on the purchase thereof, with interest. This enactment was necessary for the protection of the purchaser, for the reason that the proceedings were void.

The vacating of the sentence rendered it inoperative from the time it was pronounced, so that it could not invalidate the assignments in question. I think therefore the set-off was properly allowed, and that the judgment of the County Court should be affirmed.

Recent English Decisions.

Court of Exchequer, May 9, 1853.

HALDANE *v.* JOHNSON.* [1]

Coram POLLOCK B., PARKE B., PLATT B., and MARTIN B.

To an action on a covenant in a lease to pay the rent reserved, quarterly, it is no answer, that the defendant was on the demised premises on the quarter day, ready to pay the lessor, but that the latter did not come to receive it.

THE declaration stated that the plaintiff, by deed, let to the defendant a house, situate, &c., to hold for fourteen years from the 25th of December, 1846, at the annual rent of 105*l.*, payable quarterly, on the 25th March, &c.; that the defendant "covenanted with the plaintiff that he would pay the plaintiff the said rent at the said respective days and times, and in manner aforesaid." Breach, non-payment of a quarter's rent, due the 25th December, 1852.

Plea, that upon Christmas day, 1852, being the quarter day on which, &c., the defendant was at and upon the said demised house and premises by the space of one half hour before the setting of the sun on the said day, the same being a sufficient time before sunset to allow of the counting before sunset of the money hereinafter mentioned, and the defendant continued there from the said time, until at and after the setting of the sun on the said day; he being, during all the time last aforesaid, ready and willing to pay the sum of 26*l.* 5*s.*, being the amount of the said rent in respect of the said demised house and premises so then due and payable from the defendant to the plaintiff as aforesaid, if the plaintiff had been minded to take and accept the same; but neither the plaintiff nor any other person on his behalf came there or was ready there to receive the same, and that from the said Christmas day hitherto, the defendant has been and still is ready and willing to pay to the plaintiff the said sum of 26*l.* 5*s.*; and he now brings the same into court, &c.

Demurrer and joinder.

Mr. *J. S. Willes*, in support of the demurrer, was stopped by the court.

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* Reported by P. B. Maxwell, Esq.

[1] The following cases are from an English publication entitled "The Common Law and Equity Reports in all the Courts," consisting of Reports by several members of the Bar, (Vol. I. P. VII. pp. 672, 675,) and will be in Vol. 20, Eng. Law & Eq. Reports.

Mr. *M. Smith.* The covenant sued upon is not to pay a sum in gross, but to pay "the said rent . . . in manner aforesaid." But "rent reserved, payable yearly, is to be paid on the land;" [1] and the defendant shows that he was ready and willing to pay it there, if the plaintiff had applied for it. Independently of the covenant, the obligation on the defendant would have been only to pay on the land; and the covenant did not alter his liability, for it refers to the rent in a manner which shows that there was no intention to treat it as a sum in gross. It is said in *Hare* v. *Savill*,[2] that "it was agreed, that the covenant" to pay rent according to the reservation, "shall not alter the nature of the rent." The plea is taken from a precedent in Chitty on Pleading.[3]

The following authorities were also referred to in the course of the argument: — Co. Litt. 201 b; Com. Dig., tit. Pleader, 2 V. 14; Sheppard's Touchst. 535.; *Rowe* v. *Young*[4]; *Johnson* v. *Clay*[5]; *Poole* v. *Tumbridge*.[6]

Mr. *J. S. Willes* in reply. If there had been no covenant to pay the rent, the plea might, perhaps, have been good, although it is not exactly, as asserted on the other side, like the plea in Chitty on Pleading. But the covenant created a distinct personal obligation to pay the rent, and gave a personal remedy against the covenantor, wholly independent of his common law remedy for the recovery of his rent. [Bro. Ab. "Tender," pl. 22, *Rowe* v. *Young*; *Horne* v. *Lewin*[7]; *Crouche* v. *Fastolfe*[8]; *and Cole* v. *Walton*,[9] were cited.] *Cur. adv. vult.*

On a subsequent day, the judgment of the Court was delivered by

Martin B. His Lordship, having stated the pleadings, proceeded as follows: — We are of opinion that the plea is bad. Several authorities were cited by the counsel for the defendant, but none of them support the position which it was necessary to establish, — that where a lessee covenants to pay rent, and no particular place for payment is mentioned in the deed, the fact of his being ready and willing to pay the rent on the premises, on the day when it fell due, is either a performance of the covenant or an

[1] Bac. Ab. Conditions, p. 4
[2] Brownlow, 2d Part, p. 273.
[3] Vol. 3, p. 235, 7th ed.
[4] 2 B. & B. 165, 234.
[5] 7 Taunt. 486; 1 B. Moo. 200.
[6] 2 M. & W. 223.
[7] 1 Ld. Raym. 639.
[8] Sir T. Raym. 418.
[9] 3 Lev. 103.

answer to an action upon it, if no demand has been made. Several passages were cited from Coke upon Littleton; but they all have reference to conditions. No doubt, at common law, in order to entitle the lessor to re-enter and avoid the estate for forfeiture by breach of the condition for the payment of rent, it is incumbent on the lessor to demand the rent on the land, and on the day when it becomes due, a sufficient time before sunset to enable the tenant to pay it. This is distinctly laid down in Co. Litt. 201, b.; and the statute 4 Geo. 2, c. 28, as well as the recent Common Law Procedure Act, proceeded on the ground, that such was the common law. We are, however, clearly of opinion, that a covenant for the payment of rent, such as is averred in the present case, is an obligation of a character entirely different from, and not at all governed by, the rules of law applicable to conditions and forfeitures. The plea now in question is the same as the plea in *Crouche* v. *Fastolfe*,[1] which was cited during the argument. The action there was in debt, while in the present case it is on a covenant to pay at the time and manner reserved, no place for payment being mentioned. The case of *Bushin* v. *Edmunds*, twice mentioned in Cro. Eliz., first in the King's Bench, 415, and again in Error, 535, was also cited. It is badly reported; and the distinction between an action for rent, and the right of entry for conditions broken, does not seem to have been adverted to. It also was an action of debt for rent, and not on covenant for non-payment of it. Two other authorities, however, were referred to, *Rowe* v. *Young*,[2] in the House of Lords, and the judgment of the judges there, and *Poole* v. *Tumbridge*[3], — which, in our opinion, clearly show that the plea is bad. The covenant is a covenant to pay a sum of money to the lessor upon a particular day, no place being mentioned for payment, either expressly or by implication. In such a case, it is clearly laid down, in both the above cases, that it is the duty of the covenantor to seek out on the appointed day the person to be paid, and tender the money; and in *Poole* v. *Tumbridge* it is stated by *Parke* B., as the conclusion from the authorities, that "nothing can discharge a covenant to pay on a certain day but actual tender or payment on that day,

[1] Sir T. Raymond, 418.
[2] 2 B. & B. 165; 234.
[3] 2 M. & W. 223.

although, if the party afterwards choose to receive the money," it is a payment to be "pleaded in the way of accord and satisfaction." This is in exact conformity with the rule laid down in Sheppard's Touchstone, 378, that where an obligor is to pay a sum of money, or do a like thing to the obligee, on a day certain, but no place is set down where it shall be done, it must be done to the person of the obligee, wheresoever he may be, if he be *infra quatuor maria.* No precedent was cited for such a plea in an action on covenant, and we are satisfied that none exists, or it would have been discovered in the investigation made in the case of *Rowe* v. *Young.* In Com. Dig. tit. Pleader, page 242, the plea seems to be approved of in the action of debt, but nothing of the kind is anywhere found in regard to the action of covenant. 2 V. 14. On the contrary, there is a passage which seems to show that a subsequent levy by distress is not a good answer to the action on covenant for rent, "for," it is said, "this admits the rent not paid at the day."

We are, therefore, of opinion, that a covenant for the payment of rent, at the time and manner reserved, when no particular place is mentioned, is analogous to a covenant to pay a certain sum of money in gross on a day certain; in which case it is incumbent upon the covenantor to seek out the person to be paid, and to tender the money, for the simple reason that he has contracted so to do.

Our judgment upon the main question being for the plaintiff, it is unnecessary to advert to the technical point which was raised.

Judgment for the plaintiff.

GIEBS v. FREMONT.[1] *June* 6. *July* 6, 1853.

Coram, POLLOCK C. B., ALDERSON B., PLATT B., and MARTIN B.

The contract, which a drawer of a bill of exchange enters into by that instrument is, that in consideration that the payee will give time for payment, the drawee will pay the sum at the expiration of that time; and that if the latter does not do so, the drawer will, upon notice of the default given by the holder, pay the amount with — where no rate of interest is specified — lawful interest. That lawful interest, is that of the place where the bill is drawn.

THIS was an action upon a bill of exchange, dated March 18, 1847, and drawn at Ciudad de los Angeles,

[1] Reported by P. B. Maxwell, Esq.

California, by the defendant, the Governor of California, upon the Hon. James Buchanan, Secretary of State of the United States, Washington. The bill required the latter, at ten days' sight, to pay to F. Huttmann, or order, 6000 hard dollars; and, after several indorsements, it was ultimately indorsed to the plaintiff.

Upon the trial before *Alderson*, B., at the Middlesex sittings, in Easter Term, it appeared that the bill had been dishonored by the American government; and the only question in dispute was, as to the rate of interest which was recoverable as damages. For the plaintiff, Californian interest was claimed, which was proved to be 25 per cent.; while it was contended, on behalf of the defendant, that as the bill was made payable at Washington, 6 per cent. only, the rate of interest in that city, could be recovered. The verdict was taken for the lower rate, but leave was given to the plaintiff to move to increase the damages by 19 per cent. per annum interest on the amount of the bill.

The *Attorney-General* (Sir *A. J. E. Cockburn*) having obtained a rule accordingly,

Mr. *Bovill* and Mr. *Aspland* showed cause. The plaintiff can only recover Washington interest; for the cause of action arose there. The money was to be paid there. Whether the payee was there or not at the time when the bill fell due, is immaterial; if he was not, it must be taken that he had an agent there. It is true the contract was made at California, but it was a contract to pay at Washington; and the *lex loci solutionis* must determine the amount of damages. Reason and convenience are in favor of this rule. It is to be borne in mind that interest is not made payable by the bill. It forms, therefore, no part of the contract; and the rate of interest at the place where the contract was entered into, is, consequently, immaterial. The interest is only recoverable as damages for the breach of the contract, and it must be measured by the rate prevalent in the place where the contract is broken; that is, where the cause of action arose. But the cause of action arose as soon as — and was, therefore, complete where — notice of dishonor was given. *Whitehead* v. *Walker*.[1] It is said that in *Cougan* v. *Banks*,[2] which was an action on a bill drawn in Bermuda on England, 7½ per cent., the Bermuda rate of interest was recovered; but it appears,

[1] 9 M. & W. 506.

[2] Chitty on Bills, 683.

from the judgment roll, that the declaration in that case claimed that amount specially, as damages for reasonable and customary charges incurred. [The cases of *Scofield* v. *Day*[1] and *Cooper* v. *Waldegrave*[2] were cited.]

Mr. *Bramwell* and Mr. *Willes* in support of the rule. The argument on the other side would be well founded, if the defendant was the acceptor of the bill instead of being the drawer. In that case, it is admitted, the *lex loci solutionis* would apply. But it is no part of the drawer's contract that he will pay at the place mentioned for payment, if the acceptor fail to meet the bill. He contracts, in that event, to pay generally. This is a question of the law-merchant; and a ruling principle throughout that law is, general convenience in the ordinary course of transactions. If a bill, drawn at Cadiz on London, were dishonored, no action would, in general, be brought in the latter place, but the bill would be returned to Cadiz, and the drawer would be sued there. This would be the ordinary course of business; and it points clearly to the law of the country where the bill was drawn as governing the remedy, and, as part of that, the amount of damages recoverable. Convenience alone would require that these should be measured by the rate allowed in the country of the tribunal. The case of *Cougan* v. *Banks*,[3] is decisive upon the point. In Story on the Conflict of Laws, § 314, it is said that the *lex loci contractûs* is to govern the rate of interest recoverable. "The drawer," the same author adds, "is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract. [*Alderson* B. The transaction amounts to this: Fremont, in California, owes money there; and he asks his creditor for time to get a person in Washington to pay him the amount, with Washington interest — undertaking that, if he cannot get the person to pay it accordingly, he, Fremont, will pay the debt. The creditor agrees, but Fremont fails in procuring such person; consequently, he is bound to pay the debt, and to pay damages at the rate of the place where the debt was contracted, that is, California.] Precisely; Com. Dig. tit. Chancery, Interest for money, (3. s. 1.) The

[1] Rox. on Bills, 398. [2] 2 Beav. 282. [3] Chitty on Bills, 683.

defendant would have been discharged if the other person had paid at Washington. [*Alderson* B. The contract which is governed by the *lex loci contractûs* is, in truth, a different contract.] Mr. Justice *Story*, in the 315th section of the work already quoted, says, "The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree, upon due notice, to reimburse the holder in principal and damages, at the place where they respectively entered into the contract." If, in the case already supposed, of a bill drawn at Cadiz on London, the holder, instead of returning the bill to Cadiz, were to redraw, as he might do, he would be entitled to include in the redraft, or "*retraite*," as it is called in the French code,[1] with re-exchange, which would include the expense and interest at the rate of the place where the bill was drawn, or where it was indorsed, as the case might be. [*Gibb* v. *Mather*,[2] *Rothschild* v. *Currie*,[3] *Allan* v. *Campbell*,[4] *Trimbey* v. *Vignier*,[5] and Story on Bills, § 153, were alluded to in the course of the argument.] *Cur. adv. vult.*

The following judgment of the Court was, on a subsequent day, delivered by

Alderson B. The general rule is, that the *lex loci contractûs* is to govern in the construction of the instrument; but that applies only when the contract is express. In that case the express terms must be construed according to the law of the place in which it is framed. Now, a bill, drawn on a third person in discharge of a present debt, is, in truth, an offer by the drawer that, if the payee will give time for payment, he will give an order on the acceptor to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso that if the acceptor does not pay, and the payee, or the holder of the bill, gives notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest. This is then the contract between the parties: if the interest be expressly, or by necessary implication, specified on the face of the bill, then the interest is governed by the terms of the contract itself; but if not, it seems to follow that the rate of interest must be

[1] Code de Commerce, § xiii., Du Réchange.
[2] 8 Bing. 214.
[3] 1 Q. B. 43.
[4] 6 Moo. P. C. 320.
[5] 1 Bing. N. C. 151.

that of the place where the contract is made, just as the notice of dishonor must be governed. *Rothschild* v. *Currie.* A bill drawn at A., *primâ facie* bears interest as a debt at A. would, if nothing else appeared; but, if that bill be indorsed at B., the indorser is a new drawer; and it may be a question whether this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill — that is, a bill expressly made at A. In the former case, it would carry interest at the rate current at B., in the latter, at the rate at A. On this subject we find a difference of opinion in the books — Mr. Justice *Story*, in his Conflict of Laws, section 314, maintaining the former, and *Pardessus*, vol. v. p. 305, maintaining the latter opinion. But this case is a contract at San Francisco, by which the defendant there offers to pay to the payee, in discharge of a debt due there, the payment at Washington by the acceptor of a given sum. That sum is not paid; the defendant's original liability then revives on notice of dishonor duly given to him. The defendant then becomes liable to pay, as he was liable at the first. At first he ought clearly to have paid the money at San Francisco; and, if he did not, he would have been liable to pay interest at the usual rate in California, for a period as long as the debt remained unpaid. That is the amount which he ought to pay now. This point was expressly ruled in *Allen* v. *Kemble*;[1] it is also so ruled in *Cougan* v. *Banks*.[2] This question is not to be left to the jury, for it depends on the rule of law. What is the amount of interest at each place is to be so left, so is the question whether any damage has been sustained in payment of interest at all; for these are questions of fact. The jury have found that interest was due, and that there was damage which ought to be recovered in the shape of interest. They also have found what the usual rate of such interest is at Washington, and what the usual rate of such interest is in California; but which rate is to be adopted by them is, we think, a question purely of law, for the direction of the judge to the jury. We think the direction in this case should have been, that the California rate of interest should be adopted, inasmuch as the contract was made in California; and therefore this rule must be absolute to enter the verdict for the plaintiff, with nineteen

[1] 6 Moo. P. C. 214.

[2] Chitty on Bills, 683.

per cent. additional interest to the six per cent. already allowed. Rule absolute.

Miscellaneous Intelligence.

THE CASE OF JAMES CLOUGH.—It is officially announced that the Governor of Massachusetts has appointed Friday, the 28th day of April next, for the execution of James Clough, convicted of the murder of Gideon Manchester, before the Supreme Judicial Court of that State, at Taunton, in the County of Bristol, at the session of said Court, on the 30th day of December, 1852.

The Revised Statutes of Massachusetts, (c. 125, § 1,) provide that, "Every person who shall commit the crime of murder, shall suffer the punishment of death for the same," (c. 139, § 11, 13); that "When any person shall be convicted of any crime for which sentence of death shall be awarded against him, the Clerk of the Court, as soon as may be, shall deliver to the sheriff of the county a certified copy of the whole record of the conviction and sentence, and the sheriff shall forthwith transmit the same to the Governor, and the sentence of death shall not be executed upon such convict until a warrant shall be issued by the Governor with advice of the Council, under the great seal, with a copy of the record thereto annexed, commanding the sheriff to cause execution to be done; and the sheriff shall thereupon cause to be executed on such convict the judgment and sentence of the law;" (§ 13), "The punishment of death shall in every case be inflicted by hanging the convict by the neck until he is dead; and the sentence shall, at the time directed by the warrant, be executed within the walls of the prison of the county in which the conviction was had, or within the inclosed yard of such prison."

Statute 1852, c. 274, provides that, (Section 1,) "When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to hard labor in the State Prison until such punishment of death shall be inflicted."

Sect. 2. "And no person so imprisoned shall be executed in pursuance of such sentence within one year from the day such sentence of death was passed, nor until the whole record of such proceedings or case shall be certified by the clerk of the court which passed the sentence under the seal thereof to the Governor, nor until a warrant shall be issued by the Governor with advice of the Council, under the great seal, with a copy of the record thereunto annexed, commanding the sheriff of the county in which the trial was had, to cause execution to be done."

This statute was afterwards (Stat. 1853, c. 286,) so far amended as to provide that the convict might be sentenced to imprisonment or hard labor, or imprisonment in the county jail or house of correction of the county where he was convicted until the punishment of death was inflicted, and might be hung within the yard or walls of such house or jail.

It was, perhaps, anticipated by some, that the act of 1852 would operate a practical abolition of capital punishment; but that enactment does not substantially inodify the previously existing law, except in deferring the execution of the convict, and requiring his intermediate con-

finement in the State Prison. It was the plain and imperative duty of the Executive, however unpleasant it might be, to see that the law was enforced.

A question having been made as to the true construction of the act of 1852, the opinion of the judges of the Supreme Court was taken, and is given below. The matter was then referred to a committee of the Executive Council, whose very able report is printed in full; after which the Governor issued his warrant for the execution.

The path of duty before the Executive under this state of facts was perfectly plain. The sentence of the court in pronouncing the penalty for the commission of the highest crime known to the law, required the action of the Executive Government of the Commonwealth. The existing statutes left but one course open to the government, and that they properly pursued. At the same time, that full opportunity might be offered to the Legislature either to put a different construction upon the existing law, or to change the law and abolish the death penalty entirely, the day of execution was postponed until the 28th April. At any rate, the question of the continuance of the death penalty will be definitely settled. If there is no action by the Legislature, the penalty will remain upon the Statute Book; if the Legislature wishes to abolish capital punishment, they should do it by an open, direct and positive enactment.

We offer no apology for occupying so much of our space with these documents. Both for their intrinsic merit, and as important material for the history of this subject, they should be preserved in a form convenient for reference.

Commonwealth of Massachusetts.

The Governor, by and with the advice of the Council, has appointed Friday, the 28th day of April next, for the execution of James Clough, convicted of the murder of Gideon Manchester, before the Supreme Judicial Court at Taunton, in the County of Bristol, at the session of said Court on the 30th day of December, 1852.

Secretary's Office, Boston, Dec. 31, 1853.

By direction of His Excellency the Governor, and the Honorable Council, the following correspondence, and other documents in reference to the case of James Clough, a convict under sentence of death, is ordered to be published.

E. M. WRIGHT,
Secretary of the Commonwealth.

Commonwealth of Massachusetts.

Executive Department,
Council Chamber, November 15, 1853.

To the Honorable the Justices of the Supreme Judicial Court.

By the 13th section of the 139th chapter of the Revised Statutes, it is provided, that the punishment of Death "shall be executed within the walls of a prison of the county in which the conviction was had, or within the inclosed yard of said prison."

By the 1st section of the 274th chapter of the Laws of 1852, it is provided, that "any person convicted of a crime punishable with death, shall be sentenced to hard labor in the State Prison, until such punishment of death shall be inflicted."

A case has arisen, and is now under consideration by the Executive, of a person convicted of a capital crime in the County of Bristol, on the 30th day of December, 1852.

The convict is now confined in the State Prison, in the County of Middlesex, pursuant to his sentence passed in conformity with the provisions of the act of 1852, above cited.

A question having been raised upon a supposed conflict between the foregoing enactments, the Governor of the Commonwealth respectfully requests your Honors' opinion to be communicated to him at your earliest convenience, upon the following questions:

Has the Executive of the Commonwealth authority in the case stated, to issue a warrant to the Sheriff of the County of Bristol, commanding him to take the convict aforesaid into his custody, and remove him into the County of Bristol, and cause the sentence of Death to be executed upon him within the walls of the enclosed yard of a prison in said county?

If not, what is the duty and authority of the Executive in the premises?

JOHN H. CLIFFORD.

To HIS EXCELLENCY JOHN H. CLIFFORD,

Governor of the Commonwealth of Massachusetts:

The undersigned, Justices of the Supreme Judicial Court, in answer to the questions submitted to them by your Excellency, of which the foregoing is a true copy, respectfully submit the following answer:

When two statutes, passed at different times, are in any respect in conflict with each other, if they prescribe different and incompatible rules of conduct in the same case, they must be construed according to the obvious and well known rule of exposition, that the latter act of legislation controls and modifies the prior; and to the extent to which they are inconsistent, repeals the former, without express words of repeal; so far as they are not inconsistent, the provisions of both are to be followed and carried into execution.

We are of opinion that, although the latter of the statutes cited devolves additional duties on the Executive Government, not contemplated in the former, yet there is very little, if any, conflict between them; and construed together, according to the foregoing rules, they render the duty of the Executive plain and clear.

Whenever the law requires a duty to be done by the Governor, or any subordinate officer, it carries with it an authority to do all acts proper and necessary to the performance of such duty, and requires a conformity therewith, by all officers and persons concerned.

The statute of 1852 having provided that a convict sentenced to suffer death, shall be also sentenced to hard labor in the State Prison, until the further execution of the punishment of death, in pursuance of a warrant, which shall not issue within one year from the time that judgment is given, this change of the law necessarily requires a modification of the sentence by the Court, and also of the mode of executing it by the Executive.

But the former act still remains in force, requiring the Governor, with advice of Council, to issue his warrant to the Sheriff of the County where the conviction was had, requiring him to execute the sentence at the time to be fixed by such warrant, and at the place designated by law and expressed in the warrant.

Taking both acts together, we are of opinion that such warrant may and ought to require the Sheriff of the County of Bristol, at a suitable and convenient time, previous to the time fixed for the execution, to take the convict into his custody at the State Prison in Charlestown, and may and ought to require the Warden of said Prison to surrender such convict to the Sheriff for that purpose, pursuant to the sentence under which he is held, and further requiring the Sheriff to keep such convict in safe and close custody, and him transport to the jail, within the limits or precincts of which such sentence of death is required by law to be executed, to be kept until sentence is executed, or until he is otherwise discharged by order of law.

We are of opinion, therefore, in more direct answer to the question proposed, that the Executive of the Commonwealth has authority, in the case stated, to issue a warrant to the Sheriff of the County of Bristol, commanding him to take the convict mentioned into custody, from the Warden of the State Prison, and remove him into the County of Bristol, and cause sentence of death to be executed upon him within the walls of the inclosed yard of a prison in said county.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEO. T. BIGELOW.

Boston, 17th November, 1853.

Commonwealth of Massachusetts.

Executive Department,
Council Chamber, December 19, 1853.

TO HIS EXCELLENCY JOHN H. CLIFFORD, *Governor of the Commonwealth:*

The Committee of the Executive Council on Pardons, to whom was referred the case of James Clough, together with the correspondence of your Excellency with the Justices of the Supreme Judicial Court, in relation to the same, beg leave respectfully to report:

James Clough was tried at an adjourned term of the Supreme Judicial Court, holden in Taunton, in and for the County of Bristol, on the 28th of December, 1852, on an indictment for the murder of Gideon Manchester, of Fall River, and found guilty of the same; and thereupon the following sentence was passed: "It is therefore considered and ordered by the Court, that the said James Clough be removed from this place to the common jail of this County, and thence to the State Prison in Charlestown, in the County of Middlesex, and there to be confined at hard labor, until the execution of the further and final sentence of the law, which is, that at such time after the expiration of one year from the thirtieth day of December, A. D. 1852, as the Executive Government of this Commonwealth may by their warrant fix and appoint, he the said James Clough be taken to the place of execution, and there be hanged by the neck until he is dead."

The history of the case is briefly this: In the night-time of the 16th day of July, A. D. 1852, four dwelling-houses in the town of Fall River were burglariously entered by this convict, while the inmates were sleeping, and several larcenies of money, watches and other property were successfully perpetrated by him. He had but recently come to Fall River, from New York, provided with the tools of a burglar; and while engaged in his criminal enterprise was armed with a loaded revolver. The burglaries which he contemplated and consummated involved, therefore, the premeditated contingency of the murder of those whose homes he invaded, if he should be discovered by them in the prosecution of his guilty purpose. They fortunately escaped this peril; but another worthy and unoffending citizen of Fall River became its victim. When it was known that these bold and desperate burglaries had been committed, Mr. Gideon Manchester joined in the pursuit of the burglar, and arrested him. While accompanying him to the Police Office, where he had pretended a willingness to go without resistance, Clough suddenly started off into a less frequented street, and upon Manchester's pursuing him, to prevent his escape, he deliberately turned upon him, drew his revolver, and shot him down. Manchester lingered a few days in great suffering, and on the 19th day of July died of the wound. The life of a worthy and industrious man, with a wife and children dependent on his daily toil, was thus sacrificed to the courageous and exemplary discharge of his duty as a good citizen, by the wilful and deliberate act of the person who now stands convicted of the crimes both of burglary and murder.

During the period of nearly twelve months' confinement of this convict in the State Prison, it is the testimony of the Chaplain, and other officers of the institution, that he has manifested no signs of contrition or remorse. No expression of penitence, none of sorrow or regret, for the atrocious deed that deprived an unoffending fellow-man of life, and plunged an innocent and once happy family into unutterable distress, has escaped his lips.

By the record above quoted, it appears that James Clough has been duly and legally convicted of the crime of murder; all the forms which the law, in its wisdom and humanity, has provided for the protection of innocence, have been strictly complied with. The convict, after a full and fair trial, before a jury of his country — almost of his own selection, acting under the charge and direction, in all matters and questions of law, of the highest judicial tribunal of the Commonwealth, and having in his defence the aid of able and learned counsel, with power to summon, at the expense of the State, all such witnesses as his counsel or himself may have thought material or important to that defence — has been pronounced guilty; and no reason appearing, why the sentence of the law should not be passed against him, it has been passed, and he now stands a convict under sentence of death.

The fact of his guilt of the awful crime of murder having been judicially ascertained and determined in the mode, and by the means which the law has prescribed, in the greatest tenderness to all persons charged with capital offences, the law then declares and affixes the penalty.

The law has done for this convict all that it could do, and all that the most humane regard for life could require. It has shielded him with the presumption of his innocence, at every step and stage of his trial; it has required every reasonable doubt of his guilt to be removed from each of twelve minds; and has furnished all the aids and facilities in his behalf which have just been adverted to, and which render the conviction of an innocent man, at this day, and in this Commonwealth, almost a moral impossibility; yet his twelve triers and peers have, upon their oaths, pronounced him guilty; and the Court seeing no legal ground of exception to their verdict, have passed upon him the sentence of the law, which is death.

Whether the law upon our statute book, which declares "that every person who shall commit the crime of murder shall suffer the punishment of death for the same," and which has been there from the very foundation of the Government, and through all the periods of our history, and which is to be found also in the codes of nearly all the civilized and Christian governments of the earth, be a wise, just, or politic law, and entitled to the almost universal approbation it has received, is not for your Committee to determine, or even to consider. Whatever their private or individual opinions may be upon that question, it is enough for them to know that thus saith the law which is over us all, and above us all; whose servants we are, and whose bidding we are bound to perform.

Your Committee, then, report that they find the law against murder still remaining on the statute book, with all its dread and terrific sanctions, and all its original force and effect. Finding the law still existing, and wholly unimpaired, except in the mere matter of time, by the act of 1852, your Committee dare not recommend your Excellency to disregard it, or to evade it, in any manner, or by any means. By such an act, they would draw down on themselves the just censure of all right-minded men. Were they, being a part of the Executive department of the Government, thus to advise and counsela *non-execution* of the law, it would justly be regarded a great outrage, if not a grave offence.

By comparing the particular provisions of the act of 1852, chap. 274, with the law, as it existed at the time of its passage, it will be seen at once that the only change it made in the law on this subject, consists in the extension of the time for the execution of the sentence, for the period of *one year*, at least, from the day of the sentence; and that, during that time, the convict shall be under sentence at hard labor in the State Prison; and in the further change consequent on this, that it is the duty of the Clerk of the Court to certify the record within *one month* from the passing the sentence, instead of doing the same "*as soon as may be*," as provided by the former law.

Your Committee, on a careful analysis of the second enactment, and comparing its provisions with the law previously existing, can see no other changes whatever, than those above indicated.

The great primal enactment still remains unaffected and unimpaired, and in all its original import and effect. *Whoever shall commit the crime of murder shall suffer the punishment of death!* There is no intimation in the act of 1852 which touches one jot or tittle of this law, and being intact, it should not pass away until its requisitions are all fulfilled; and least of all, under the auspices and direction of those whose sworn duty it is to see that the laws are executed; or in other words, the Executive department of the Government.

Of the wisdom or humanity of the act of 1852, it does not become your Committee to speak. It is sufficient that the Legislature has enacted it. The business of the Executive is with its enforcement. It may very probably have been the purpose, thus to increase the chance of newly discovered evidence, and to prevent, by such delay, all possibility of mistake in the final execution of the dread sentence. But, whatever may have been the motive or the purpose, the law itself, in the judgment of your Committee, admits of but one construction, and that is the one already given to it.

Your Committee cannot believe it to have been the purpose of the Legislature, by their enactment, to create a tribunal in the Executive Department of the Government, to determine by their own will, judgment, caprice or prejudice, whether human life shall be taken or not, in any given case, or in all cases of capital offences — to put the lives of the people, convicted of capital offences, literally in our hands, for us to dispose of them according to our sovereign will and pleasure, or as our fallible judgment may dictate, or as our caprices or prejudices may suggest! The proposition itself, when fully stated, is perfectly monstrous, and entirely opposed to our whole theory of administration, government and legislation. The Government, instead of being as the Constitution has expressly declared it to be, a government of laws, becomes, in one of its most solemn and important functions, a government of men, and that in the most odious of all possible forms. Any theory which leaves it to the best judgment of the best men, occupying places in this department, whether sentence of death, passed in due course of law, against any convict, shall be executed upon him or not, is utterly indefensible. Under a government of laws, no Executive, however incorruptible, can safely be entrusted with such powers.

Your Committee, therefore, cannot believe that the Legislature intended such a purpose as this; and, without any design to express an opinion on the subject of capital punishment, in the abstract, they do not hesitate to say that such a law, under which mere discretion is to govern in matters of life and death, would be a reproach to any people.

In the particular case before us, there is no petition by the convict or others, for a pardon or commutation of sentence. The clemency of the

Executive is not invoked. There is no appeal for mercy on the ground of error or mistake in any of the proceedings in the case, or on account of any peculiar circumstances belonging to it, which, if they existed, might justify interposition in behalf of the convict, even at this late stage. There is no application to the pardoning power, which, in all humane and wise Governments, must be lodged somewhere, and which, under our system, is lodged in the Executive Department. The question now before the Committee is not one of pardon or commutation of sentence. It is of a wholly different character. The convict rests under sentence of death, passed upon him under this very act of 1852, and the true and the only question is, whether, by inaction and doing nothing, this department of the Government shall frustrate and prevent the due and impartial administration of the law; whether the Executive of this Commonwealth shall ignore the very existence of the law, and thus render it of no effect. Your Committee would prove faithless to the trust reposed in them, were they to advise your Excellency to such a course. However painful the duty, they are bound to recommend that the sentence of the Court be enforced, in its true meaning and intent. It being a painful duty, their only safety consists in keeping within the clearly defined boundaries of the law.

They are constrained, therefore, in this the first case arising for Executive consideration under the enactment referred to, to advise your Excellency to issue the warrant in due form of law, for the execution of the sentence against James Clough, convicted of the crime of murder, at such time after the expiration of one year from the day of sentence, as to your Excellency shall seem fit and proper.

For the Committee. ELISHA HUNTINGTON, Chairman.

To the Honorable the Executive Council:

GENTLEMEN: — The Committee of the Council, to whom was referred the case of James Clough, a convict under sentence of death for the crime of murder, having submitted to me a report advising that a warrant be issued for the execution of that sentence, and the whole Council having unanimously concurred in this advice, it becomes my duty as the Chief Executive Magistrate of the Commonwealth, to make a final decision of the question to which it refers.

The clear and conclusive exposition of the true state of the law governing this case, which is contained in this report, and in the accompanying opinion of the Justices of the Supreme Judicial Court, which I felt it to be my duty to obtain from that tribunal, leaves me little occasion to enlarge upon its provisions. Whatever may have been the intention or the expectation of individual members of the Legislature, in the enactment of the law of 1852, it is manifest that the people of Massachusetts, in declaring their will through the ordinary forms of legislation, the only mode of ascertaining that will which is open to the Executive, have not yet seen fit to abrogate that provision of their criminal code, whose dread import is expressed in these few and simple words — "Every person who shall commit the crime of murder, shall suffer the punishment of Death for the same."

This is the law of this Commonwealth; and I cannot, without a violation of the solemn obligation I have taken in my official oath, undertake to say, expressly or by implication, in any official act, that it was the intention of the Legislature, or the expectation of the people, that this law should never be executed. Nor can I, without an equal violation both of my reason and my conscience, do any act, or omit to do any act, which may give the remotest countenance to the pernicious idea, that any law standing upon the statute book can safely be treated as a mere dead-letter enactment,

having no vital force or efficiency. In a government of laws, no statute should remain unrepealed for a single day that cannot be enforced whenever the case arises which it is designed to reach. Upon this principle depends the moral power of all law, and I should be faithless to my own clearest convictions, if I contributed, in any degree, to weaken or impair its just application.

If, therefore, a majority of the people of this Commonwealth, acting through their representatives in the Legislative and Executive departments of the Government, deem it expedient that capital punishment should no longer constitute the judicial penalty for the crime of murder, let them follow the example of our sister State of Rhode Island, and openly and distinctly declare its abolition. But I cannot assume — what would be so derogatory to its character — that it was the intention of the Legislature, by any indirection to throw off from itself the responsibility of declaring what the law is, under the pretext of limiting the discretion of the Executive, in respect to the time and mode of its enforcement. Equally inadmissible, in my judgment, is the inference which has been drawn from this enactment, that the Legislature intended so to enlarge that discretion as to entrust to it the despotic power of determining whether the law should be enforced at all.

It has been earnestly urged upon me, since this case has been under consideration by those for whose friendly sentiments and philanthropic motives I entertain great respect, that I may avoid the responsibility of issuing a warrant, by following the example of the Executive of the neighboring State of Maine, (where a similar statute has existed for several years and no execution has taken place,) and leave the case, without any action on my part, in the hands of my successor. There are two sufficient and decisive answers to this suggestion. The statutes of the two States are similar, but not the same. In an essential particular, especially affecting the responsibility of the Executive, the law of Maine lacks one provision which is contained in that of Massachusetts. But were this otherwise, I should feel that such an unmanly and pusillanimous evasion of my own responsibility, and a transfer of it to my successor, burdened with the additional embarrassment of my dereliction of duty, would be both unjust to him, and unworthy of myself. Nor could I shelter myself under any precedents established by the Executive authorities of other States, the reason and justice of which did not approve themselves to my own convictions. In assuming the trust which imposes upon me the necessity of determining this question, I undertook, in every case that came within my official cognizance, to see that the laws are faithfully executed, according to the best of my own abilities and understanding. These I have conscientiously applied to the case before me, the record of which has been duly certified to me for my official action — and no precedent or authority can release me from the obligation I am under to follow their guidance. Upon a question of mere expediency, I may accept and be guided by the judgment and opinions of others. In a matter of personal duty and obligation, I must have the sanction of my own.

To you, gentlemen, who know with what anxious consideration I have endeavored to ascertain precisely what my official duty required of me in this painful case, and my determination to be governed in its discharge by the conclusions to which I might conscientiously arrive, I need not say that I should have been unspeakably gratified to have been led to a different result. It would have been to me a source of the highest satisfaction, if, during my brief administration of the responsible functions of this office, I could have been spared the necessity of determining a question like this. But this satisfaction I could not purchase by a conscious want of fidelity to

any trust I had assumed, without a surrender of my own self-respect and the just forfeiture of the confidence of others.

In the case under consideration, I cannot resist the conclusion that it is clearly and plainly my duty to cause the warrant to issue for the execution of the sentence. It is the sentence of the law; and not of the Court that pronounced it, or of the Magistrate who causes it to be enforced. The abrogation or modification of that law is in other hands than mine. My duty is concerned only with its proper execution. In the discharge of this duty, I purpose to leave such an interval between the issuing of the warrant and the time of its execution, as will enable the Legislature, if it sees fit, to give to this convict the benefit of any change in the law, if any change is deemed by them to be expedient.

With your advice and consent, therefore, I shall cause a warrant to issue to the Sheriff of the County of Bristol, commanding him to cause to be executed the sentence under which James Clough now stands convicted for the murder of Gideon Manchester, on Friday, the twenty-eighth day of April next, unless he shall be, in the mean time, discharged from that duty, by the interposition of the Executive, or by operation of law.

JOHN H. CLIFFORD.

Council Chamber, December 31st, 1853.

New Way of getting a Verdict. — A case which has attracted a good deal of public notice, lately pending in the U. S. Circuit Court, in Ohio, viz., an indictment of several persons for conspiracy to defraud Insurance Companies by burning the steamboat Martha Washington, ended, contrary to public expectation, in a verdict of *Not Guilty*. The Cleveland Herald gives the following history of the trial.

The defence brought on about three hundred witnesses, and made an imposing display in administering the oath to this array. The prosecution supposed these witnesses were to be examined; when lo! and behold, after perhaps a third had testified, they were suddenly astounded by the announcement of counsel that the defence had closed its testimony. The stroke was bold and successful. The prosecution intended to introduce rebutting evidence, but the witnesses were not present, the Court could not delay to remedy the oversight of counsel, and the case must go to the jury. Mr. Morton, the District-Attorney, was obliged without any preparation to make the opening argument. Mr. Stansbury, the leading counsel for the government, had prepared himself for the closing argument, but when Mr. Morton concluded, the counsel for the defence signified to the court that they declined to answer Mr. Morton, and were ready to submit the case. This was a finishing stroke, and cut off all further argument, and saved the defendants from the influence of a closing argument against them from one of the most powerful lawyers in the State.

An Indian on Lying. — The Cattaraugus Whig states that a suit was recently brought before a magistrate in the village of Randolph, and during its progress an Indian was brought forward to testify. His blank, expressionless face, and the general unmeaningness of his whole demeanor, gave rise to a serious doubt in the mind of the "Court" as to the admissibility of his testimony. Accordingly, he was asked what the consequences would be if he should tell a falsehood under oath. The countenance of the Indian brightened a little as he replied in a solemn tone, "Well, if I tell a lie, guess I be put in jail — great while, may be. Bimeby I die — and then I ketch it again." The witness was permitted to proceed.

Camphene in Omnibuses. — An action for damages was yesterday brought in the Marine Court, on the ground of injuries done to the complainant by the explosion of a camphene lamp in a public stage. Judge Thompson held that, from the well-known danger of camphene, its use in an omnibus made a party liable for damages which, in consequence of the said use, may ensue. Judgment was accordingly rendered in favor of plaintiff, for $ 100, the amount of alleged damage. — *N. Y. Eve. Post.*

The Boston Chronicle states that an action has been commenced against a mercantile house in that city, to recover the sum of $3700, alleged to have been paid by the plaintiff in the purchase of liquors, on the ground that the transaction was in violation of the "Maine Law." As the firm refused to give bonds, a deputy sheriff took possession of the store.

We take pleasure in calling the attention of our readers to Messrs. T. & J. W. Johnson's advertisement of their valuable publications in the advertising sheet of the Law Reporter. They issue many valuable works, whose intrinsic excellence and moderate price commend them to the patronage of the profession more effectually than we can do.

Obituary Notice.

Died, at Manchester, N. H. on the 15th of November, 1853, Charles Gordon Atherton, a member of the Bar of that State, and, at the time of his decease, of the Senate of the United States. Although Mr. Atherton had been much in public life, he had not given up the avocations of his profession, and the sudden attack which terminated his life, fell upon him in the very midst, and on the field of its labors. On the morning of the 10th of November last, he entered the Court-Room in Manchester, where he had been actively engaged for some weeks, and soon after, while conversing with a member of the bar, he was suddenly attacked by paralysis, and on the Saturday following he died.

Mr. Atherton had been frequently honored by evidences of the confidence of his native State, and seemed to inherit a claim to political honors. His grandfather, Joshua Atherton, was a lawyer of eminence — a member of the Convention of the State of New Hampshire which ratified the Constitution of the United States, Senator and Attorney-General of that State. Charles H. Atherton, father of the deceased, was also an accomplished lawyer, was frequently a member of the State Legislature, and represented New Hampshire in the Fourteenth Congress.

We make the following extracts from a recent speech of the Hon. Harry Hibbard, of New Hampshire, in the House of Representatives, made upon the announcement to that body of Mr. Atherton's decease:

"The family of Atherton has long been noted in New Hampshire for talent and accomplishment. But it has become extinct, in the direct line, with the subject of these remarks.

"Charles Gordon Atherton was born at Amherst, in Hillsborough county, New Hampshire, July 4, 1804. He graduated at Cambridge University, (1818) with unusual reputation for ability and scholarship, at an early age. He studied law in the office of his distinguished father, Hon. Charles H. Atherton, was admitted to the bar at the age of twenty-one, and established himself in business in the town of Dunstable, now Nashua, in his native county. In his profession his success was decided, and his rise rapid. His mind, clear, logical, and strong, with the ballast of excellent common sense, the adornments of a quick fancy and a cultivated taste, was admirably adapted to the studies and the labors of the law. So far as was permitted by the interruptions of political life, he continued to the last in the active practice of his chosen profession. As a lawyer, it is not too much to say of him that he stood in the front rank of a bar which has always been fruitful of legal strength and acumen. His place was side by side

with such compeers as Pierce, Woodbury, Parker, Bartlett and Bell — following, but not unworthily, in the path of those earlier 'giants of the law,' Webster, Mason, and Jeremiah Smith.

"In 1830, if I rightly remember, he commenced his public career as a representative from Nashua in the New Hampshire Legislature. In this office he was continued for a period of several years. He was Speaker of the House of Representatives for the last three of those years. In March, 1837, he was chosen one of the Representatives of New Hampshire in the National Congress, where he remained for three successive terms. At the expiration of that period, he was transferred to the Senate of the United States for the term of six years. In November, 1852, he was again elected to the Senate, and occupied a seat in that body during the Executive session succeeding the inauguration of President Pierce, in March last. * * *

"But a few weeks ago I saw him in the scene of his last professional labors. Of all those present, there was no one who would not have been selected as the first probable victim of the great Destroyer as soon as he. Absorbed in professional engagements, his mind yet found time to dwell upon the anticipated duties of his senatorial station, to which he was proposing soon to repair — the chosen representative of his beloved State — largely honored with the friendship and confidence of the Chief Magistrate of the nation. A few days, and the tidings came that death had touched him with his palsying hand. Another interval of painful suspense, and we knew that he slept the sleep which knows no waking."

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Allen, Joseph	Springfield,	Nov. 30,	Henry Vose.
Aynes, Alvah G.	Charlestown,	" 7,	Asa F. Lawrence.
Bragg, Austin	Boston,	" 7,	Charles Demond.
Brune, Alphonso	Lowell,	" 25,	Isaac S. Morse.
Calef, Isaac W.	Lowell,	" 29,	Isaac S Morse.
Clapp, Moody	Brighton,	" 15,	Josiah Rutter.
Copp, James M.	Saugus,	" 10,	John G. King.
Curtis, Allen C. et al.	Newton,	" 9,	Asa F. Lawrence.
Curtis, Charles A. et al.	Newton,	" 9,	Asa F. Lawrence.
Curtis, George et al.	Newton,	" 9,	Asa F. Lawrence
Curtis, Henry et al.	Newton,	" 9,	Asa F. Lawrence
Davenport, William B.	Boston,	Oct. 24,	Charles Demond.
Dickenson, Asahel G.	Templeton.	Nov. 25,	C. H. B. Snow.
Drew, Richard L.	Milton,	" 8,	Samuel B. Noyes.
Estey, William H. Jr.	Randolph,	Dec. 8,	Samuel B. Noyes
Farnsworth, Jesse E.	Ashburnham,	Nov. 4,	C. H. B. Snow.
Forristall, James	Boston,	" 12,	John P. Putnam.
Gardner, Henry N.	Watertown,	" 15,	Asa F. Lawrence
Gould, Ivory	Boston,	" 1,	John P. Putnam.
Harding, Jesse	Fitchburg,	" 30,	C. H. B. Snow.
Harmon, Moses M.	Lowell,	" 8,	Isaac S. Morse.
Harris, Henry	Cambridge,	" 9,	Asa F. Lawrence.
Johnson, Samuel	Salem,	" 19,	John G. King.
Kellogg, Gardner	Chicopee,	" 1,	Henry Vose.
Maxwell, William	Woburn,	" 4,	Asa F. Lawrence.
Mitchell, Lyman	Chelsea,	" 1,	John P. Putnam.
Moore, Edward N.	Cambridge,	" 22,	A. F. Lawrence,
Munger, Milton C.	Palmer,	" 1,	Henry Vose.
Murphy, Daniel	Roxbury,	" 12,	Francis Hilliard.
Noyes, James L.	Boston,	" 26,	John P. Putnam.
O'Leary, Patrick	Boston,	" 28,	Charles Demond.
Perkins, James H.	Coleraine,	" 22,	Henry Vose.
Rice, James	Stow,	Oct. 21,	Josiah Rutter.
Russell, Leander G.	Haverhill,	Nov 7,	John G. King.
Shipman, John et al.	Hadley,	" 19,	Haynes H. Chilson
Shipman, John Jr. et al.	Hadley,	" 19,	Haynes H. Chilson.
Snow, Joseph W.	Marblehead,	" 2,	John G. King.
Tufts, William F.	Charlestown,	" 14,	John M. Williams.
Waite, Addison	Hubbardston,	" 10,	Henry Chapin.
Winn, Oliver B.	Boston,	Oct. 19,	Charles Demond.
Wyman, William H.	Lowell,	Nov. 24,	Isaac S. Morse.

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